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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 102

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ROBINS DRY DOCK & REPAIR COMPANY,
PETITIONER,

*vs.*

GEORGE FLINT, SAMUEL W. COLLINS, AND
LUDWIG T. BREHM, ETC.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR CERTIORARI FILED AUGUST 2, 1926

CERTIORARI GRANTED OCTOBER 25, 1926

(32,113)

certificate
6 Sup. 433

(32,113)

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1926

## No. 546

ROBINS DRY DOCK & REPAIR COMPANY, PETITIONER,

vs.

GEORGE FLINT, SAMUEL W. COLLINS, AND LUDWIG T. BREHM, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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Original Print

[fols. a & 1]

## IN UNITED STATES DISTRICT COURT. SOUTHERN DISTRICT OF NEW YORK

George Flint, Samuel W. Collins, and Ludwig T. Belhm, Doing Business under the Name of Flint, Collins & Co., Inc., a Limited Partnership, Libelants,

against

Rouse Dry Dock & Repair Company, Respondent

Docket Entries

1920.
July 30 Libel filed.

1921
Aug. 2 Answer and interrogatories filed.

1923
Oct. 31 Trial before Hon. Henry W. Goddard, D. J.

1924
Apr. 2 Opinion rendered in favor of Libelant.
June 16 Interlocutory decree entered.
Oct. 20 Reference begins before Mark W. Maclay, Jr., Esq., Commissioner.
[fol. 2]

1925
Feb. 3 Reference resumed.
May 14 Reference resumed.
May 21 Reference concluded.
Aug. 27 Commissioner's report filed.
Sept. 30 Final decree entered.
Oct. 15 Notice of appeal filed.
Oct. 16 Assignment of errors filed.

In United States District Court

Libel

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The libel of George Flint, Samuel W. Collins and Ludwig T. Belhm, doing business under the name of Flint,

Goering & Co., Ltd., a limited partnership against Robins Dry Dock & Repair Company, in a cause of contract and damage, civil and maritime, alleges as follows:

First: The libellants at all the times hereinafter mentioned were and still are copartners, doing business as a limited partnership, under the firm name and style of Flint, Goering & Co., Ltd., engaged, among other things, in the business of chartering and operating steamships, and having their principal place of business in the City of Philadelphia.

Second: The respondent, Robins Dry Dock & Repair Company, at all the times hereinafter mentioned was and still is a New York corporation engaged in business as a shipwright and having a shipyard and dry docks at Erie Basin, and an office in the City and Southern District of New York.

Third: On or about July 29, 1915, the Norwegian steamship Rosecrans, of which the libellants were time-chartered owners under a charter party dated on or about September 15, 1913, was delivered to the respondent for drydocking, cleaning, painting and certain repairs, for a certain compensation to be paid therefor, pursuant to an agreement which had been entered into between the respondent and the owners of said steamship, which agreement was made for the benefit of the libellants and was incidental to the aforesaid charter party of September 15, 1913.

The respondent received said steamship and undertook to perform said work with reasonable dispatch and in a skilful, careful and workmanlike manner.

Fourth: After said steamship was delivered to the respondent on or about July 29, 1915, it was discovered in her propeller by reason whereof it became necessary to install the spare propeller on board said steamship, which work the respondent undertook to perform.

Said spare propeller could not be installed by reason partly and all the other work hereinafter and aforesaid was delivered to the respondent completed said steamship to be delivered to the libellants from the respondent's [illegible] on August 4, 1915.

Fifth: The respondent, notwithstanding the aforesaid obligations did not perform the aforesaid work in a skilful,

careful and workmanlike manner, but on the contrary the respondent, its agents and servants, conducted themselves therein in a careless and negligent manner and in the course of installing the aforesaid spare propeller recklessly and negligently permitted the same to fall, thus breaking one of its blades and making it useless, by reason whereof it became necessary to have a new propeller cast, and said steamship was delayed and detained until 3 p. m., August 15, 1917, to the libellants' damage in the sum of $33,068.38 or thereabouts, with interest, payment of which has been duly demanded but refused.

Sixth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore the libellants pray that process may duly issue against the respondent Robins Dry Dock & Repair Company, citing it to appear and answer this libel and that this Court will make a decree in favor of the libellants for their damages, as aforesaid, with interest and costs and will give the libellants such other and further relief as may be just.

H. Alan Dawson, Burlingham, Veeder, Masten & Fearey, Proctors for Libellants.

[fol. 2] *Duly sworn to by E. and H. Happer. Jurat omitted in printing.*

[fol. 3] In United States District Court

Answer

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The answer of Robins Dry Dock & Repair Company to the libel of George Flint, Samuel W. Collins and Ludwig T. Brehm, alleged to be doing business under the name of Flint, Goering & Co., Ltd., as a limited partnership, against Robins Dry Dock & Repair Company, in an alleged cause of contract and damage, civil and maritime, as follows:

I Respondent has no knowledge nor any information sufficient to form a belief as to any of the allegations of the first article of the libel.

II Respondent admits the allegations of the second article of the libel.

III Upon information and belief, respondent denies the allegations of the third article of the libel, except as herein-after specifically admitted.

IV Upon information and belief, respondent denies the allegations of the fourth paragraph of the libel, except as hereinafter specifically admitted in connection with respondent's allegations as to the contract between respondent and the [illegible] and [illegible] Corporation [illegible] relative to her [illegible] contract not pending.

[illegible] V Respondent admits that the work referred to in articles fourth and fifth of the libel relating to the installation of the steam propeller was unprofitably and negligently performed, in that the said steam propeller was permitted to fall and break out of the bushing by reason whereof it became necessary to have a new propeller cast and said steamship was delayed and detained until [illegible] August 15, 1912, that [illegible] a period of fourteen days but respondent denies any knowledge or any information sufficient to form a belief as to any of the remaining allegations of article fifth of the libel, except the allegation with reference to demand and [illegible] which allegations are admitted.

VI Upon information and belief, respondent denies that all and singular the premises in the said libel contained are true, as alleged in the [illegible] of the libel, but admits the allegation that [illegible] jurisdiction of the United States and of this Honorable Court [illegible] and avers allegation.

Further answering the libelant herein, the respondent alleges upon information and belief as follows:

VII Prior to June 28, 1912, the owners of the Norwegian steamship [illegible] of which libelants were chief engineers, by a form of charter party not amounting to a

demised, and the respondent entered into a contract under and in accordance with which this respondent undertook to dock said steamship "Borgefjord," clean her bottom and [illegible] do certain painting, and said steamship was accordingly drydocked by this respondent and in the course of the performance of the work agreed to be done by this respondent under said contract a crack was discovered in the propeller of said steamship and said propeller was condemned by the Lloyds and Veritas Classification services. The owners (and the charterers) of the said steamship thereupon employed this respondent to install the steamer's spare propeller, and this respondent in doing so, through its servants, July 31, 1917, negligently let said spare propeller fall, with the result that it was so injured that a new propeller had to be cast.

VIII. The charter party between libelants and the owners of said Norwegian steamship "Borgefjord" contained inter alia the following provisions:

"(1) That the Owner shall [illegible] maintain her in a thoroughly efficient state in hull and machinery for and during the service.

"(6) That in the event of loss of time from [illegible] breakdown of machinery, [illegible] or damage preventing the working of the Vessel for more than twenty-four consecutive hours, the payment of hire shall cease until she be again in an efficient state to resume her service.

"(7) [illegible] The act of God, [illegible] and all dangers and accidents of [illegible] Machinery [illegible] throughout this Charter Party, always mutually excepted.

"(8) [illegible] That the Steamer may [illegible] time employed in tropical waters during the term of this Charter. Steamer is to be docked [illegible] bottom cleaned and painted, whenever [illegible] Owners and Master [illegible] at least once every [illegible] months, and payment for the [illegible] to be suspended until [illegible] is made in proper dock for the purpose."

The Steamer had been withdrawn since August 22nd and charter party above quoted to be docked, her bottom cleaned and painted by this respondent.

knowledge nor any information as to the exact ownership of said steamship "Bjornefjord" or as to her relations, if any, by charter party or otherwise, to the libelants in [fol. 11] this case, and in making said payment to said master and in taking the release executed by said master this respondent procured said master to execute said release as above stated in full settlement of all the claims of said master, as master or otherwise, and all claims of the owners, &c. of said steamship "Bjornefjord," to wit: all parties having any property interest in said steamship. A copy of said general release is hereto annexed marked "Schedule A" and made a part of this answer. In addition to making said payment in consideration of the release by said master as above, this respondent abscond said steamship and installed the new propeller that had been cast without charge being made therefor against said master or the owners of said steamship.

XIII. That it will appear from the charter party between libelants and the owners of said Norwegian steamship "Bjornefjord" that during the off hire periods provided for in and by the terms of said charter party libelants were not in possession of said steamship, were not entitled to the use of said steamship and were not again entitled to the use of said steamship until said off hire periods should terminate.

XIV. That the libelants [illegible] rights to the contract between this respondent and the owners of the said steamship "Bjornefjord" [illegible] with which this respondent [illegible] and is not bound upon her.

[fol. 12] XV. That respondent was a stranger to the contract of charter party between the owners of said steamship and the libelants herein, and this respondent alleges upon information and belief that if the negligence of this respondent's employees as above mentioned prevented the owners of the steamship "Bjornefjord" from performing the said contract of charter party or otherwise with libelants herein during the said period of "off hire" delay or any other such period, respondent is not [illegible] to the libel

suits for any damages the libelants may have sustained in that behalf.

XVI. All and singular the premises are true.

Wherefore respondent prays that the libel herein may be dismissed, with costs.

Barry, Wainwright, Thacher & Symmers, Proctors for Respondent, 59 Wall Street, Borough of Manhattan, City of New York.

*Duly sworn, etc.* (by Wallace F. Gallien). *Jurat omitted in printing.*

[fol 13] Exhibit to Answer

Interrogatory Propounded by Respondent to be Answered by Libelants under Oath

First Interrogatory. Please set forth a copy of the contract of charter party between libelants and the owners of the steamship "Burnet Lord" under which said steamship was being operated or used immediately prior to the delivery of said steamship at the respondent's dock or yard and after the redelivery of said steamer upon the completion of the work done thereon by respondent.

Second Interrogatory. Please state in detail how the amount of damages claimed in the libel was arrived at, stating the items thereof in detail.

Third Interrogatory. Was written claim or claims that notice was first given by or on behalf of libelants to the respondent of the alleged fact that libelants herein had any claim for damages such as is set up in the libel or otherwise? (fol 14) If it is claimed that such notice was given in writing, attach a copy of the notice to your answer to this interrogatory and state how such notice is claimed to have been delivered to respondent. If it is claimed that such notice was given orally, state when, where, by whom and to whom such notice is claimed to have been given.

Barry, Wainwright, Thacher & Symmers, Proctors for Respondent.

## Schedule A to Answer

To all to whom these presents shall come or may concern, Greeting:

Know Ye, That I, Rasmus Rasmussen, as master of the Norwegian S. S. "Bjornefjord" for and in consideration of the sum of Three Thousand two hundred and seventy one 21 100 dollars ($3,271.21 100), lawful money of the United States of America to me in hand paid by The Robins Dry Dock & Repair Company, a corporation, the receipt whereof is hereby acknowledged, have remised, released, and forever discharged, and by these presents do for said Steamship, her owners, &c., and myself, my heirs, executors and administrators remise, release and forever discharge the said Robins Dry Dock & Repair Company, its servants, agents, successors and assigns of and from all manner of action and actions, cause and causes of action, suits, debts, dues, sums of moneys, accounts, reckoning, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law or in equity, which against said Robins Dry Dock & Repair Company, [fol. 15] I, as master or otherwise, and the owner &c. of said S. S. "Bjornefjord" ever had, now have or which they or I, our successors, assigns, heirs, executors or administrators, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents, and especially of and from all claims and demands arising out of towage and or detention of said steamship in any way due to the breaking of propeller on said vessel on or about July 31, 1917.

In witness whereof, I have hereunto set my hand and seal the seventh day of December in the year one thousand nine hundred and seventeen.

Th. Jullum.

Sealed and delivered in the presence of R. Rasmussen as Master.

State of New York,
County of New York, ss:

On this 7th day of December, 1917, before me personally appeared Rasmus Rasmussen, as master of the Steamship "Bjornefjord" to me known, and known to me to be the same person described in and who executed the within instrument and he duly acknowledged to me that he executed the same, as master as aforesaid.

William H. Wilson, Jr., Notary Public, Kings County, No. 180. Kings County Register's No. 9656. Certificate filed in New York County No. 241. New York County Register's No. 9291. Commission expires March 30, 1919.

[fol. 16] In United States District Court

[Title omitted]

Libellants' Answer to Interrogatories

First. A copy of the charter party dated September 13, 1913, is annexed hereto.

Second. The damages of $35,000.00, as claimed in the libel, are figured on the basis of the difference between what the libellants would have been obliged to pay the owner of the steamer under the charter of September 13, 1913, except for the fourteen days loss of use of said steamer (which was $2,347.76 or thereabouts) and the market value of said steamer for said period (which was $35,580.74 or thereabouts). The libellants reserve all rights as to increasing the amount of damages or otherwise.

Third. (a) Before August 10, 1917, and on that date or [fol. 17] thereabouts notice was delivered by a letter dated August 10, 1917, reading as follows:

"Confirming our previous advices to you we are the time chartered owners of the Norwegian Steamship Bjornefjord, and have been kept out of the possession and will lose the use of this ship by reason of the breaking of her propeller on or about August 1 while you were making

repairs to her, due, we are informed, to your negligence. In consequence thereof the vessel will be detained at your yard for a considerable period.

Our loss through this detention, based upon the market value of the ship, and her value to us, is approximately $75,000 per month.

We must accordingly advise you that we shall hold you liable and responsible for our damages either direct to us or through the owners. We will submit a statement of our damages and claims so soon as the amount is definitely known."

H. Alan Dawson, Burlingham, Veeder, Masten & Fearey, Proctors for Libellants.

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[fol. 18] In United States District Court

[Title omitted]

Before Hon. Henry W. Goddard, D. J.

**Case**

October 31, 1923.

Appearances of Counsel

Burlingham, Veeder, Masten & Fearey, by Mr. Hupper & Mr. Dawson, for the libellants.

Barry, Wainwright, Thacher & Symmers, by Mr. Symmers, for the respondent.

Offers in Evidence

Mr. Hupper: For the libellant, I offer in evidence the charter party between the owners of the vessel and the libellant.

(Received and marked Libellant's Exhibit 1.)

Mr. Hupper: I call for the production of a letter dated August 10, 1917, addressed by the libellant to the Robins Dry Dock.

[fol. 19] ... counsel for the respondent produces the letter.)

Mr. Hopper: I offer this letter in evidence.

(Received and marked Libellant's Exhibit 2.)

The allegations of the first article of the libel are admitted by the respondent with respect to the partnership of the libellant.

The libellant's case is made up of the answer of the respondents, to which I refer, and it will be deemed I take it, that those admissions are in evidence as part of the pleadings.

Mr. Symmers: I think it would save considerable time if the stenographer will take down the reputation of that part of Mr. Hopper's statement which was very clear with reference to the absence of any connection on the part of the agents in making these contracts.

Mr. Hopper: With contracts?

Mr. Symmers: For the docking and the painting and the cleaning of the vessel's bottom and the subsequent contract with reference to installation of the propeller.

Mr. Hopper: The libellants admit that they have nothing to do with making whatever contractual relations there were between the respondent and the ship owners concerning the docking of the vessel and the installation of the propeller.

Mr. Hopper: Libellant rests.

Mr. Symmers: I call for the production of the letter of August 10th.

Mr. Hopper produces the letter.

Mr. Symmers: I offer in evidence a letter dated Philadelphia, August 10, 1917, addressed by the Moore Dock Company to Captain R. Tammen, master of the steamship Hyperion, and signed by owners at New York City.

(Received and marked Respondent's Exhibit A.)

Mr. Hopper: It will appear after that that other was withdrawn, but it is not. It was sent back to us by the master.

Mr. Symmers: I rested as to the burden of an affirmative defense. The allegations in the other articles

"We now understand from you through Messrs Hellieson that the Robins Drydock & Repair Company expect to get the propeller today and to fit it on and have the vessel ready on or about Monday next the 13th instant. This will mean that we will have been kept out of possession of the vessel since about August 1st, and have lost the use of her for approximately two weeks, by reason of the negligence resulting in breaking the propeller which we understand was caused by the Robins people. Our loss for this two weeks period, based upon the market value of the vessel and her value to us, is approximately $7,500, and will of course be increased if there is any further delay.

"We feel that under the facts now before us the Robins Company should pay our claim and we intend to endeavor to collect it from them and purpose to send them a notice to that effect if you have no objections.

"But our Attorneys tell us that under the present law as understood it is doubtful if we can collect direct from Robins as we have no contractual relations with them, and that to protect ourselves we must make claim against you owners for our damages so that you and they may then recover the amount from the Robins people and settle with us. In other words, that we will first collect our damages as well as we can from the Robins people and you owners to make up damages.

"We accordingly have no alternative but to herewith make formal claim upon you owners through you for whatever damages we have suffered or may hereafter suffer by reason of the above detention and loss of use of the vessel.

"We have endeavored to act, however, and herewith request that if the Robins Company is responsible we naturally do not desire to put ourselves to the money, and we will do everything possible to force Robins to pay and will cooperate with you fully to that end. We understand that you already have an affidavit of liability from the Robins people, and we can therefore see no objection to our now making these two claims which we are showing to you, but if you consider it best under the circumstances that we do not send you the claim we shall refrain from doing this and will be glad to receive any suggestion you may care to make."

The Court: So I understand, Mr. Symmers, that a suit had been brought by the charterers against the owners to recover for this loss of time and that the libel had been dismissed?

Mr. Symmers: Yes, sir, but subsequent to the writing of this letter.

The Court: On the ground that the charterers had no claim against the owners?

Mr. Symmers: No, sir, on the ground that owing to the terms of the charter party there was no claim on the part of the libellant against the owners because the owners in the charter party had not agreed when the vessel was withdrawn, that she should be returned to the service of the libellant in a specific period and that the intervening negligence of a third party was not the fault of the owner, and the libel was dismissed. The Circuit Court of Appeals held that they had exercised due diligence and that for Robin's negligence they were not responsible.

Mr. Symmers: I offer on behalf of the respondent, the general release that we took from Captain Rasmussen on settlement with the owners, the release being dated the seventh day of December 1917.

(Received and Marked Respondent's Exhibit B.)

Mr. Hupper: I object to that on the ground that it has no binding force on the libellant.

Respondent rests.

(fol. 23) Mr. Hupper: May I ask you, Mr. Symmers, whether you contend that this release which you put in evidence covers the time chartered in the expression "owners, etc."?

Mr. Symmers: It covers everybody for whom the master as master acted as agent. Whether he was agent for this purpose for your people is a question that I have not gone into very thoroughly. I do not really feel that it has that effect, but I will not admit that it has not that effect.

Mr. Hupper: The question of whether I will call a witness depends on whether you contend that the release may cover the libellant at the time of the charter.

Mr. Symmers: I do not think so because before we executed that release we had notice that you were the charterer. No, I do not think so.

Winge & Co.
CHRISTIANIA
TELEGRAMS: WINGE

# Time Charter

GOVERNMENT FORM

Simpson, Spence & Young,
NEW YORK, LONDON,
WEST HARTLEPOOL,
LIVERPOOL AND GLASGOW

Christiania

This Charter Party made and concluded upon in the City of Sweden the thirtenth day of September 1913

Between Messrs. Joh. Ludw. Mowinckel & Son of Bergen owners of the good Steel Screw Steamship "BJØRKEFJORD" of 3680 tons gross register and 2337 tons net register, having engines of 307 nominal horse power and classed with proper certificate for hull and machinery and classed ✠ 100 A 1 at Lloyds of about 326705 cubic feet capacity and about 6180 tons dead weight on thereabouts on Loyds Summer freeboard inclusive of bunkers when are of the capacity of about 517 tons of coal and stores, now trading.-

Steamers speed is about 9 knots on about 20 tons best Welsh.-

and Messrs. Flint Coering & Co. Ltd. Charterers of the City of Philadelphia

Witnesseth: That the said Owners agree to let, and the said Charterers agree to hire the said Steamship from the time of delivery for a period of 5 years

Steamer to be placed at the disposal of the Charterers at a port in U.S. north of Hatteras in such dock or at such wharf or place (where she may always safely lie afloat at all times of tide) as the Charterers may direct, and being on her delivery ready to receive cargo and light, staunch, strong and in every way fitted for the service, having water ballast, steam winches and donkey boiler with capacity to run all the steam winches at one and the same time (and with full complement of officers, seamen, engineers and firemen for a vessel of her tonnage) to be employed in carrying lawful merchandise, including petroleum or its products and passengers as far as accommodation will allow (but any expense necessary to fit the steamer to carry petroleum or its products shall be borne by the owners before the delivery hereof) within the following limits:

to trade between UNITED STATES and MEDITERRANEAN or in such lawful trades as are allowed in owners underwriters policies not south of Bahia Blanca nor East of Singapore, excluding West Indies & Habana oretrades, regular Canadian Coasting, regular European ore trades, regular Hamburg coaltrade, Himanima and all unsafe ports.-

as the Charterers or their Agents shall direct, on the following conditions:

1. That the Owner shall provide and pay for all provisions, wages and consular shipping and discharging fees of the Captain, Officers, Engineers, Firemen and Crew, shall pay for the insurance of the vessel, also for all the cabin, deck, engine room and other necessary stores, and maintain her in a thoroughly efficient state in hull, machinery and gear for the service.

2. That the Charterers shall provide and pay for all the Coal, Cocoa, Water, Port Charges, Pilotages, Agencies, Commissions, Consular Charges, except those pertaining to the Captain, Officers or Crew, and all other Charges whatsoever, except those before stated. Charterers are to provide necessary dunnage and shifting boards, but Owners to allow them the use of the dunnage and shifting boards already aboard Steamer.

3. That the Charterers shall accept and pay for all Coal in the Steamer's Bunkers, and the Owners shall, on the expiration of this Charter Party, pay for all Coal left in the Bunkers, at the current market price at the respective Ports where she is delivered to them.

4. That the Charterers shall pay for the use and hire of the said Vessel £ 1200-say- twelve hundred pounds British Sterling per Calendar Month, commencing on and from the day of her delivery, as aforesaid, and at and after the same rate for any part of a month; hire to continue until her delivery in like good order and condition, to the Owners (unless lost) at a port in U.S. north of Hatteras

5. That should the Steamer be on her voyage towards the port of redelivery at the time a payment of hire becomes due, said payment shall be made for such a length of time as reasonably or they, Agents and Charterers, or their agents, may agree upon as the estimated time necessary to complete the voyage, and when the steamer is delivered to owners, agents any difference shall be refunded by Steamer or paid by Charterers, as the case may be.

6. Payment of the said hire to be made in cash by Messrs. Samuel Montagu & Co. London in the current United States gold coin, or in approved bankers sight bills on London, at Owners option, monthly, in advance, on the day on which the same becomes due; and in default of such payment the Owners shall have the option of withdrawing the said Steamer from the service of the Charterers, without prejudice to any claim they (the Owners) may otherwise have on the Charterers, in pursuance of this Charter.

7. That the cargo or cargoes to be laden and/or discharged in any dock or at any wharf or place that the Charterers or their Agents may direct, provided the Steamer can always safely lie afloat at any time of tide.

8. That the whole reach of the Vessel's Holds, Decks, and usual places of loading and accommodation of the Ship (not more than she can reasonably stow and carry), shall be at the Charterers disposal, reserving only proper and sufficient space for Ship's officers, crew, tackle, apparel, furniture provisions, stores and fuel.

9. That the Captain shall prosecute his voyages with the utmost dispatch, and shall render all customary assistance with Ship's crew and boats. The Captain (although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment, agency, or other arrangements, and the Charterers hereby agree to indemnify the Owners from all consequences or liabilities that may arise from the Captain signing Bills of Lading or otherwise complying with the same.

10. That if the Charterers shall have reason to be dissatisfied with the conduct of the Captain, Officers, or Engineers, the Owners shall, on receiving particulars of the complaint, investigate the same, and, if necessary, make a change in the appointments.

11. That the Charterers shall have permission to appoint a Supercargo, who shall accompany the steamer and see that voyages are prosecuted with the utmost dispatch. He to be furnished, free of charge, with first-class accommodation, and same fare as provided for Captains table.

12. That the Master shall be furnished from time to time with all requisite instructions and sailing directions, and shall keep a full and correct Log of the voyage or voyages, which are to be patent to the Charterers or Agents.

13. That the Master shall use all diligence in caring for the ventilation of the cargo.

14. [illegible]

Philadelphia and Charterers through their

Reserve The Fourth Street National Bank of

16. That if required by Charterers time not to commence before 1st December 1913 and should Steamer not be ready for delivery on or before 1st February 1914 Charterers or their Agents to have the option of cancelling this Charter at any time not later than the day of Steamer's readiness.

17. That in the event of loss of time from deficiency of men or stores breakdown of machinery stranding or damage preventing the working of the Vessel for more than twenty four consecutive hours the payment of hire shall cease until she be again in an efficient state to resume her service but should the Vessel be driven into port or to anchorage by stress of weather or from any accident to cargo such detentions or loss of time shall be at the Charterers risk and expense.

18. That should the Vessel be lost freight paid in advance and not earned (showing from the date of her loss) shall be returned Sheffield Chamberpre. The act of God enemies fire restraint of Princes Rulers and People and all dangers and accidents of the Seas Rivers Machinery Boilers and Steam navigation and Errors of Navigation throughout this Charter Party always mutually excepted

19. That should any dispute arise between the Owners and the Charterers the matter in dispute shall be referred to three persons at New York one to be appointed by each of the parties hereto and the third by the two so chosen their decision or that of any two of them shall be final and for the purpose of enforcing any award this agreement may be made a rule of the court

20. That the Owners shall have a lien upon all cargoes and all sub freights for any amounts due under this Charter and the Charterers to have a lien on the Ship for all moneys paid in advance and not earned

21. That all derelicts and salvage shall be for Owners and Charterers equal benefit (owners average if any to be according to York Antwerp Rules 1890)

22. [redacted]

23. That as the Steamer may be from time to time employed in tropical waters during the terms of this Charter Steamer is to be docked bottom cleaned and painted whenever Charterers and Master think necessary at least once in every six months and payment of the hire to be suspended until she is again in proper state for the service

24. That the Owners are to provide ropes falls slings and blocks sufficient to handle ordinary cargo up to three tons (of 2240 lbs each) but Charterers are to be responsible for all damage to same caused by overloading

25. Steamer to work night and day if required by Charterers and all steam winches to be at Charterers disposal during loading and discharging and Steamer to provide [redacted] if same required. Charterers agreeing to pay extra expenses if any incurred by reason of night work at the current local rate

26. It is also mutually agreed that this Charter is subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States approved on the 13th day of February 1893 and entitled "An Act relating to Navigation of Vessels etc"

27. Two and one half per cent upon the hire earned under this Charter payable to the Steamship and Owners due to Messrs. Flint & Co. upon the signing hereof. Steamship owners reserve and also upon any continuation or extension of this Charter to be paid

28. An address commission of 2½ per cent payable to Messrs. Flint Goering & Co. Ltd.

29. Penalty for non performance of this Contract estimated amount of damages

29. Failing payment of hire by charterers to their bankers on the day it falls due, owners to have the right of declaring this contract to be null and void and to withdraw steamer without any notice or protest and without interference of any court or any other formality whatsoever.-

30. Owners to be at liberty to pass survey once during the currency of this charter at a time and place convenient to them, steamer being redelivered to charterers at the port where delivery for passing survey was taken or as may be mutually agreed.- Survey is due November 1915.

31. Steamer is expected to drydock in September or October 1913 and if drydocked then steamer is not to drydock till earliest six months after same.-

32. Charterers have to deposit £ 3000 three thousand pounds Br. Stg. in cash with Messrs. Samuel Montagu & Co. London, or charterers arrange with Messrs. Montagu to give their bank guarantee for this amount-payable to owners immediately if hire not paid by charterers to their bankers as it falls due or if otherwise charter broken by charterers.-

33. Should Captain require funds at any United States port, charterers or their agents to advance same, subject to a commission of 2½ per cent-or at any foreign port, not exceeding £ 100 at each port, subject to a commission of 4 percent such advances to be deducted from next hire money.-

34. Charterers to have the liberty of subletting the steamer, if required by them, they remaining responsible for the due fulfilment of charter.-

35. Steamer not to be rechartered to Messrs. Tweedie Trading Co. of New York.

36. If the owners shall have exercised due diligence to make the steamer in all respects seaworthy and to have her properly manned equipped and supplied, it is hereby agreed that in case of danger, damage, disaster, resulting from faults or errors in navigation, or in the management of the steamer, or from any latent defect in the steamer, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent defect or the unseaworthiness was not discoverable by the exercise of due diligence) the consignees or owners of the cargo shall, nevertheless, pay salvage, and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in General Average to the payment of the sacrifices, losses or expenses of a General Average nature that may be made or incurred for the common benefit, or

...relating to Navigation of Vessels, etc."

...Flint & Co. ... Five per cent. upon the hire earned under ... payable by the Steamship and Owners due in this Charter or on sale of Vessel ... upon the signing hereof. ... and also upon any continuation or extension of this Charter or on sale of Vessel.

* An address commission of 5% per cent payable to Messrs. Flint Goering & Co.Ltd.
** Penalty for non-performance of this Contract, estimated amount of damages.

29. Failing payment of hire by charterers to their bankers on the day it falls due, owners to have the right of declaring this contract to be null and void and to withdraw steamer without any notice or protest and without interference of any court or any other formality whatsoever.-

30. Owners to be at liberty to pass survey once during the currency of this charter at a time and place convenient to them, steamer being redelivered to charterers at the port where delivery for passing survey was taken or as may be mutually agreed.- Survey is due November 1915.

31. Steamer is expected to drydock in September or October 1913 and if drydocked then steamer is not to drydock till earliest six months after same.-

32. Charterers have to deposit £ 3000 three thousand pounds Br.Stg. in cash with Messrs. Samuel Montagu & Co. London, or charterers arrange with Messrs. Montagu to give their bank guarantee for this amount-payable to owners immediately if hire not paid by charterers to their bankers as it falls due or if otherwise charter broken by charterers.-

33. Should Captain require funds at Any United States port, charterers or their agents to advance same, subject to a commission of 2½ per cent-or at any foreign port, not exceeding £ 100 at each port, subject to a commission of 5 percent such advances to be deducted from next hire money.-

34. Charterers to have the liberty of subletting the steamer, if required by them, they remaining responsible for the due fulfilment of charter.-

35. Steamer not to be rechartered to Messrs. Tweedie Trading Co. of New York.

36. If the owners shall have exercised due diligence to make the steamer in all respects seaworthy and to have her properly manned equipped and supplied, it is hereby agreed that in case of danger, damage, disaster, resulting from faults or errors in navigation, or in the management of the steamer, or from any latent defect in the steamer, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent defect or the unseaworthiness was not discoverable by the exercise of due diligence) the consignees or owners of the cargo shall, nevertheless, pay salvage, and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in General Average to the payment of the sacrifices, losses or expenses of a General Average nature that may be made or incurred for the common benefit, or to relieve the adventure from any common peril, all with the same force and effect, and to the same extent, as if such danger damage or disaster had not resulted from, or been occasioned by faults or errors in navigation, or in the management of the vessel, or any latent defect or unseaworthiness.-

37. If Underwriters after average condemn steamer, Charter to be null and void.

Witness to Signatures:

(sd)V.M.Kaufman -

Flint Goering & Co.Ltd.
(sd)George Flint Chairman
(sd)Oscar Goering Secretary & Treasurer

(sd)Joh.Ludw.Mowinckel & Sön

Bergen 15 October 1913.

A true Copy

Libellant's Exhibit No 1

25 - 26

Mr. Hupper: Then I understand that the respondent will not contend that the release covers the time charterers claim, that is to say, the respondent did not pretend to be settling that claim.

Mr. Symmers: I do not know what the respondent thought. We may have thought one thing and the respondent thought another. The respondent paid certain money and got a release from the master which would ordinarily bind everybody and that is what he did.

Mr. Hupper: May we have time enough to get a witness up here?

The Court: Yes.

Mr. Symmers: What is he to testify to?

[fol. 24] Mr. Hupper: It is the man who handled the settlement on the part of the owners with Robins and his testimony will be that he did not place the time charterers claim before Robins and that the claim did not include any claim of the time charterer.

Mr. Symmers: As far as Robins is concerned there was no claim, he did not know of your claim at that time.

Mr. Hupper: Captain Jullum will testify that he was acting for the owners and made a settlement of their claim with Robins and that in making such settlement he did not put forward the claim of the time charterers and did not pretend to be settling that claim.

Mr. Symmers: Have you talked with him?

Mr. Hupper: Yes, Mr. Dawson has.

Mr. Symmers: Your honor may give it all the effect that the sworn testimony would have.

Mr. Hupper: We have that in writing from Captain Jullum.

Mr. Symmers: That is quite satisfactory.

Both sides rest.

Counsel sum up.

Briefs to be submitted by November 11th.

(Here follows Libellants' Exhibit No. 1, marked side folio pages 25 and 26)

[fol. 27] Libelants' Exhibit No. 2

(Letterhead of Flint, Gocring & Co., Ltd.)

Philadelphia, August 10th 1917.

Robins Dry Dock & Repair Co., Brooklyn, New York.

Dear Sirs: Continuing our previous advices to you we are the true chartered owners of the Norwegian Steamship "Bjornefjord," and have been kept out of the possession and will lose the use of the ship by reason of the breaking of her propeller on or about August 1st while you were making repairs to her, due, we are informed, to your negligence. In consequence the use of the vessel will be detained at your yard for a considerable period.

Our loss through this detention, based upon the market value of the ship, and her value to us, is approximately $75,000 per month.

We must accordingly advise you that we shall hold you liable and responsible for our damages either direct to us or through the owners. We will submit a statement of our damages and claims as soon as the amount is definitely known.

Yours very truly, Flint, Gocring & Co., Ltd. T. J. Bass, Asst. Manager.

[fol. 28] Respondent's Exhibit A

(Letterhead of Flint, Gocring & Co., Ltd.)

Philadelphia, August 10, 1917.

Captain R. Rasmussen, master of S. S. "Bjornefjord" and agent of owners, New York City.

S. S. "Bjornefjord" Detention resulting from breaking of propeller during repairs.

Dear Sir: We now understand from you through Messrs. Hellesen that the Robins Drydock & Repair Company of just to get the propeller to-day and to set it on and have the vessel ready on or about Monday next the 13th instant.

This will mean that we will have been kept out of possession of the vessel since about August 1st, and have lost the use of her for approximately two weeks, by reason of the negligence resulting in breaking the propeller which we understand was caused by the Robins people. Our loss for this two weeks period, based upon the market value of the vessel and her value to us, is approximately $37,500, and will of course be increased if there is any further delay.

We feel that under the facts now before us the Robins Company should pay our claim and we intend to endeavor to collect it from them and propose to send them a notice to that effect if you have no objections.

[fol. 29] But our Attorneys tell us that under the peculiar circumstances it is doubtful if we can collect direct from Robins as we have no contractual relations with them, and that to protect ourselves we must make claim against your owners for our damages so that you and they may then recover the amount from the Robins people and settle with us. In other words that you and your owners should collect our damages as well as yours from the Robins people and pay over to us our damages.

We accordingly have no alternative but to herewith make formal claim upon your owners through you for whatever damages we have suffered or may hereafter suffer by reason of the above detention and loss of use of the vessel.

We have explained to you, however, and herewith repeat, that if the Robins Company is responsible we naturally do not desire your owners to lose this money, and we will do everything possible to force Robins to pay and will cooperate with you fully to this end. We understand that you already have an admission of liability from the Robins people and we can therefore see no objection to our now sending them the letter which we are showing to you, but if you consider it bad policy or unfair for any other reason that we do not send it at this time, we shall refrain from doing so and will otherwise act upon any suggestion you may have to make.

Yours very truly, Flint, Goering & Co. Ltd. T. J. Bass, Ass't Manager.

RELEASE.—EXHIBIT B

[fol. 20] To all to whom these presents shall come or may concern, Greeting:

Know ye, that I, Rasmus Rasmussen, as Master of the Norwegian S. S. "Bjornefjord" for and in consideration of the sum of Three Thousand two hundred and seventy one 21 100 dollars ($3,271.21 100), lawful money of the United States of America to me in hand paid by The Robins Dry Dock & Repair Company, a corporation, the receipt whereof is hereby acknowledged, have remised, released, and forever discharged, and by these presents do for said steamship, her owners &c., and myself, my heirs, executors and administrators, remise, release and forever discharge the said Robins Dry Dock & Repair Company, its servants, agents, successors and assigns of and from all, and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law or in equity, which against said Robins Dry Dock & Repair Company, I, as master or otherwise, and the owners &c., of said S. S. "Bjornefjord" ever had, now have or which they or I, my successors, assigns, heirs, executors or administrators, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the [fol. 21] day of the date of these presents, and especially of and from all claims and demands arising out of towage and for detention of said steamship which may due to the breaking of propeller on said vessel on or about July 21, 1917.

In witness whereof I have hereunto set my hand and seal the seventh day of December in the year one thousand nine hundred and seventeen.

R. Rasmussen, as Master

Sealed and delivered in the presence of [illegible]

State of New York,
County of Kings, ss:

On this 7th day of December, 1917, before me personally appeared Rasmus Rasmussen, as Master of the Steamship

"Bjornefjord," to me known, and known to me to be the same person described in and who executed the within instrument and he duly acknowledged to me that he executed the same, as Master as aforesaid.

William H. Wilson, Jr., Notary Public, Kings County, No. 189. Kings County Register's No. 9656. Certificate filed in New York County, No. 241. New York County Register's No. 9201. Commission expires March 30, 1919. (Seal.)

[fol. 32] In United States District Court

In Admiralty

[Title omitted]

Opinion

Goddard, District Judge:

The libel alleges and the answer admits that the steamship Bjornefjord, of which the libellants were the time [fol. 33] charterers, was delivered to the respondent for dry docking; that during the course of the work, the respondent was guilty of negligence in connection with the repairs, and as a result of this, the vessel was detained in respondent's dry dock 14 days beyond the time she should have resumed service.

This suit is to recover damages in the sum of $33,069.98 the estimated value of the use of the vessel for the 14 days of which the charterer has been deprived.

The libellants had no contract relations with the respondent, the ship owners having employed the respondent. The charter party, which did not amount to a demise, was entered into between the libellants and owner of the "Bjornefjord" on September 13th, 1913, and included inter alia, the following provisions:

"1. That the owner shall * * * maintain her in a thoroughly efficient state in hull and machinery for and during the service."

"5. * * * in case of loss of time from * * * breakdown of machinery, * * * or damage preventing the work-

ing of the vessel for more than twenty-four consecutive hours, the payment of hire shall cease until she be again in an efficient state to resume her service. * * *

"17. * * * The act of God * * * and all dangers and accidents of * * * machinery * * * throughout this Charter Party, always mutually excepted.

"22. That as the Steamer may be from time to time employed in tropical waters during the terms of this charter, [fol. 34] Steamer is to be docked, bottom cleaned and painted, whenever Charterers and Master think necessary at least once in every six months, and payment of the hire to be suspended until she is again in proper state for the service."

On or about July 29th, 1917, in accordance with article 22 referred to above, the vessel was withdrawn to be docked and to have her bottom cleaned and painted by the Robins Dry Dock & Repair Company, hereinafter called the Robins Company. In the course of this operation, a crack was discovered in the propeller and the owners employed the Robins Company to install another one, and while the workmen of the Robins Company were engaged in the process of installing this new propeller, they negligently permitted it to fall and so damaged it that it was necessary to have a new propeller cast. This casting of the new propeller caused a delay of 14 days in the return of the vessel to the use of the charterer. The dry dock was the type termed a "graving" dock, a structure permanently resting on the shore, made by dredging and the building of a coffer dam; after the ship is floated into the dock, the gates are closed and the water pumped out.

One of the defenses to this libel, asserted by the respondent, was that a settlement had been made by the owner of the Bjornefjord, and a release taken covering the damage accruing to the owner by reason of the steamer being delayed as a result of the respondent's negligence. This release did not purport to cover any claim that the libellants, [fol. 35] as the charterers, might have. On the contrary, the respondent took the position that the libellants never had any claim. In a letter of August 10th, 1917, the respondent was advised that the libellants were time charterers of the vessel "and that they made claim for the detention caused by the respondent's negligence at the rate

of $75,000 per month. The settlement with the owners pleaded by the respondent was made about December 7th, 1917, and was for admitted negligence on the part of the Robins Company. The respondent has admitted that it was liable to the owner for the owner's damages during the detention which, of course, was measured chiefly by the charter hire which the owner lost during the two weeks detention period; this was a comparatively small amount as the steamer had been chartered in 1913 when rates were low. Nevertheless, the owner's damages were limited by the amount he would have received for the vessel had she not been detained. If the owner had not bound the vessel to the libellants by the charter of September 13th, it could undoubtedly have collected from the respondent the full market value of the steamer for the detention period. The question then is: Has the respondent been absolved from the substantial balance of damages simply because the vessel is under charter, and is the time charterer wholly without remedy for the substantial loss which the respondent's negligence has caused them? The respondent asserts that the time charterer has no relief whatsoever in the premises, no matter how long the delay or how heavy the damage.

(2d 26). In the Aquitania, 270 Fed. 239, Circuit Judge Mayer, then of the District Court, held that a time charterer has a property interest in the vessel and may recover damages for a collision in which she is injured, including his damages for loss of use while she is being repaired. The principle involved in the Aquitania case, supra, is practically identical with the one in the case at bar. No cases have been submitted to me, or have I been able to find any leading to a contrary conclusion, and I think I should follow Judge Mayer's reasoning and decision.

In the case of Hines, agent, v. Sangstad S. S. Co., et al., 266 Fed. 502, cited by Judge Mayer in the Aquitania case, supra, the time charterer was allowed to recover from the respondent whose, because of respondent's negligence, a vessel's mast was damaged.

Is the right to the use of a vessel, a property right which the law recognizes and protects? If a third party, not the owner of the vessel, through negligence, deprives the charterer of this right, has he any remedy? In some instances, the charterer might protect himself in his charter party with the owner. In many instances this would be unsatis-

a charterer through virtue of a charter contract constitutes a lien on the vessel."

The principle involved in the case at bar is distinguishable from the one discussed in Byrd v. English, 117 Ga. 192, cited by the respondent. In Byrd v. English (supra) a party to a contract was damaged by reason of the failure of the other party to comply with its terms, such failure being due to the negligent act of a third person, by which the performance of the contract was rendered impossible. There, the plaintiff had no special property interest in the electric power supply, for the deprivation of the use of which he sued. Moreover, the damages in that case were prospective and remote. In the case at bar, the libellants seek to recover merely as share of the total value of the use of the vessel. Prospective profits or remote damages are not demanded. All that is asked for, is the actual value of the use of the vessel. To arrive at its fair value, it is necessary, in this instance, to consider the interest of the owner and the charterer. The charterer had a right to the use of the vessel, which had a value and could have been [p. 29] disposed of in the open market.

The respondent urges the further point that if the action here be considered to be founded on tort, then in admiralty, the place of tort determines the jurisdiction, that the alleged tort in the case at bar did not occur upon navigable waters, the ship at the time being in dry dock for repairs. However, the following authorities hold to the contrary:

The Jefferson, 215 U. S. 130, 142, 143;
Robert W. Parsons, 191 U. S. 17, 32, 34;
Donaldson v. Morse Dry Dock & Repair Co., 215 N. Y. 429, 442.

In this case it was held that a tort on a dry dock was within the admiralty jurisdiction. Certiorari was denied by the Supreme Court in 43 Sup. Ct. 70.

Anglo Patagonian, 276 Fed. 925. Certiorari denied, 242 U. S. 636.

So the law seems to be settled that the Admiralty Court has jurisdiction over a tort of this nature committed on a ship while the ship is in a dry dock undergoing repairs.

Accordingly, a decree may be entered in favor of the libelants against the respondent, with a reference to a Commissioner to ascertain the damages, unless the damages can be agreed upon.

April 2nd, 1924.

Henry W. Goddard, U. S. D. J.

[fol. 40] In United States District Court

[Title omitted]

Interlocutory Decree

The issues herein having duly come on to be heard on the pleadings and proofs and having been argued by the advocates for the respective parties, and the Court on April 2, 1924, after due deliberation, having rendered its decision granting a decree in favor of the libellants with a reference to a Commissioner to ascertain the damages

[fol. 41] Now, on motion of H. Alan Dawson and Bellingham, Vedder, Masten & Pearce, proctors for libellants, it is

Ordered that the libellants recover from the respondent the damages by them sustained by reason of the matters set forth in the libel, with interest and costs; and it is further

Ordered that it be referred to Mark W. Mackey, Jr., Esq., as Commissioner to determine said damages and report the same to this Court with all convenient speed.

Henry W. Goddard, U. S. D. J.

Notice of settlement waived. Barry, Wainwright, Thacher & Symmers, Proctors for Respondent.

[fol. 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPORT OF MARK W. MACLAY, SPECIAL COMMISSIONER

To the Judges of the United States District Court for the Southern District of New York:

I, Mark W. Maclay, Special Commissioner, do hereby report as follows:

On June 16, 1924, an interlocutory decree was entered herein, decreeing that the libelants recover from the respondent the damages sustained by reason of the matters set forth in the libel with interest and costs, and ordering that it be referred to me as Special Commissioner to determine the libelants' damages and report the same to this court with all convenient speed.

[fol. 43] On October 20, 1924, and various subsequent dates, I was attended by Burlingham, Veeder, Masten & Fearey (Roscoe H. Hupper, Esq. and W. J. Dean, Esq., Advocates) proctors for libelants and by Barry, Wainwright, Thacher & Symmers (J. C. Crawley, Esq., Advocate), proctors for the respondent, who presented testimony consisting of thirty-eight pages and twelve exhibits marked Libelants' Exhibits 1 to 6 inclusive and Respondents' Exhibits A to F inclusive, all filed herewith.

Having considered the evidence and the arguments and briefs of counsel thereon, I hereby further report as follows:

By the negligence of the respondent in connection with repairs to the SS. Bjornefjord, ordered by her owners, the vessel was detained in respondent's dry dock fourteen days beyond the time when she should have resumed service. It is not disputed that the detention of fourteen days began on August 1, 1917, and ended at 3 p. m., August 15, 1917. The decision of the court holds that the libelants, time charterers of the Bjornefjord, had a property right in the vessel of which they were deprived by the negligence of the respondent and are entitled to recover for the deprivation of the right to the use of the vessel which had

a value and could have been disposed of in the open market."

The Bjornefjord, 1925 A. M. C. 740, 745.

Three charters of the SS. Bjornefjord were offered in evidence, one by the owners to the libelants and the two [fol. 44] others by the libelants to separate subcharterers. All three of these charters are on substantially similar time forms containing similar breakdown and address commission clauses, so that nothing turns on the differences in the general terms of these charters, but only on the times and rates provided for.

The owner of the vessel, Joh. Ludw. Mowinkel, by charter party dated September 13, 1913, Libelants' Exhibit 6, chartered the Bjornefjord to Flint Goering & Co., Ltd. for five years for a hire of £1,200 per calendar month, payment to be made in cash at current short sight rate of exchange or in approved Banker's sight bills on London at owner's option, monthly in advance. On account of increased expenses due to the war, the libelants obligated themselves to pay in August, 1917, £250 per month in addition to the charter hire. Libelants' Exhibit 6. The period of this charter extended well beyond the detention which is the subject matter of this reference.

The libelants, charterers of the vessel under Libelants' Exhibit 5, chartered her for twelve months by charter party dated April 25, 1916, to Howard Houlder & Partners, Ltd. By addenda dated November 30, 1915, and November 6, 1916, the period of this charter was extended to an aggregate of twenty-six or twenty-eight months after the vessel originally came on hire. Respondent's Exhibit F. The hire under the second addendum was at the rate of £11,201 10s per calendar month, payable in cash in British sterling in London monthly in advance.

[fol. 45] It has not been shown definitely when the Bjornefjord was delivered under this charter or when the charter period under the second addendum expired, but it is clear that the Bjornefjord was duly re-delivered by Howard Houlder & Partners, Ltd. to the libelants at New York on July 22, 1917, at 11:30 a. m. Minutes, 38.

While the Bjornefjord was trading under the Houlder charter party, Respondent's Exhibit F, the libelants char-

tered her by charter party dated June 28, 1917, Respondent's Exhibit C, to Norton, Lilly & Co. for £16,295 per calendar month to be paid "in cash monthly in advance in New York at the current rate of exchange for approved Bankers demand bills on London, in U. S. Gold or its equivalent", Clause 6, "from the time of delivery for about sixteen months from expected re-delivery date of present charter, say September 1st until, say, December 27th, 1918, the expiration date of Owners 5 year charter with Flint, Goering & Co., Ltd. * * * * if required by charterers, time not to commence before August 15, 1917.

This charter party also required the charterers to pay owner's war risk insurance premium over 1% monthly on a valuation of two million kroners; but as there is not any evidence of what the owner's war risk insurance premium was and, therefore, no evidence that it was over 1%, this clause is not material to any finding herein.

From the files of Norton, Lilly & Company there were produced and offered in evidence two letters addressed to [fol. 46] Norton, Lilly & Co. by Geo. Hellissen, Inc., each signed by E. B. Searle, Vice President. Grady, 26-28. It is to be inferred from the letters themselves, from Respondent's Exhibit C, and from the testimony of Mr. Grady, that Geo. Hellissen, Inc., were agents for the time chartered owners.

The first letter dated July 7, 1917, Libelants' Exhibit 4, advises Norton, Lilly & Co. that Howard Houlder & Partners, Ltd., charterers under Respondent's Exhibit F, wished to redeliver the vessel about the end of July, and that the libelants, the time chartered owners, were willing to accept re-delivery at that time provided Norton, Lilly & Co. were "agreeable" to accepting delivery of steamer under your time charter, when vessel is ready." Libelants' Exhibit 4.

The second letter dated July 17, 1917, Libelants' Exhibit 5, refers to the charter party of June 28, 1917, Respondent's Exhibit C, and continues:

"This will serve to confirm our verbal understanding with your office to the effect that you are agreeable to taking this steamer when ready at New York, probably the end of July or early August, all other conditions of said charter party remaining in force, except that by this provision the

stipulation of the layday date in said charter is hereby understood to be eliminated."

[fol. 47] The endorsement of this letter, "1 copy to Ring Chartering Board" indicates that the letter was treated by Norton, Lilly & Co. as a modification of the charter party such as should be filed with the chartering board. These two letters were filed with the copy of the charter party. Grady, 36.

Neither the author of these letters nor the member of the firm of Norton & Lilly & Co. who actually carried on the negotiation in question, was called as a witness and the absence of neither was explained. Mr. Grady's recollection of the whole affair at the time he testified, nearly eight years later, was very faint. Grady, 29, 32.

While Libelants' Exhibits 3 and 4 were scarcely proved in accordance with strict common law requirements, there is certainly no reason whatever to question either the genuineness or bona fide character of these letters or that they were in fact sent and received about the time of their respective dates.

Moreover, Mr. Grady, who was the South American freight manager of Norton, Lilly & Co. at the time in question, testified that his firm was ready to receive the vessel whenever she tendered in the summer of 1917. Grady, 31, 33-34, that they had cargo available and were anxious to have the ship, Grady, 34, and that while he did not remember the details of the verbal understanding referred to in Libelants' Exhibit 3, there was not any question in his mind that such an agreement was made. Grady, 27.

[fol. 48] In view of the description in Respondent's Exhibit C of the time of delivery and re-delivery in terms of the expiration of the other charters, Libelants' Exhibit 5 and Respondent's Exhibit F, indicating that the Norton, Lilly & Co. charter was intended to fill out so much of the owner's five year charter as should remain after the expiration of the Howard Houlder & Partners' charter, it is quite likely that these libelants might have compelled Norton, Lilly & Co. to accept delivery of the vessel on August 1st, in the absence of evidence that the charters would have required that time should not commence before August 15, 1917. Whether or not Norton, Lilly & Co. could have been compelled to accept delivery on August 1st, it is reasonably

certain that they would have accepted the vessel had she been tendered on August 1st. The profitable employment of the vessel need not be proved beyond all doubt. It suffices if the libelant shows a state of fact from which a court or jury can find that there was an opportunity to employ the vessel and that the owner would probably have availed himself of it. The North Star, C. C. A. 2nd, 1907, 151 Fed. 168, 175.

The libelants sought to show a market value in excess of the rate of hire of the Norton Lilly & Co. charter, Respondent's Exhibit C. Mr. Richard D. Wrigley, a broker of long experience, placed the market value of the Bjornefjord on a time charter basis about the first half of August, 1917, at from $87,323.40 to $92,700 per calendar month. Wrigley, 4, [fol. 49] and supported his opinion with two charters which were put in evidence. Libelants' Exhibits 1 and 2; Wrigley, 5, 7.

A vessel such as the Bjornefjord could have been fixed on charter very quickly at that time, Wrigley, 16, and indeed Mr. Johnston readily admitted that the Bjornefjord charter, Respondent's Exhibit 6, was "about the market rate for long voyage trade at that time." Johnston, 24.

I find from the expert testimony, therefore, that between August 1 and August 15, 1917, the time charter market for such a vessel as the Bjornefjord was active and considerably higher than the rate at which the vessel was actually chartered to Norton, Lilly & Co. Particularly as the Norton Lilly & Co. charter, Exhibit C, was offered in evidence by the respondent, which is, therefore, bound thereby, the practical result is that the libelants are clearly entitled to have their damages computed at a minimum fixed by that charter.

The libelants contend, however, that under the rule of The Conqueror, 1896, 166 U. S. 110, they are entitled to have their damages computed on the market value of the Bjornefjord, even though that be higher than the amount which they in all probability would have actually obtained for the vessel. The injured party, however, is not entitled to recover for any loss beyond that which he actually sustained. The North Star, C. C. A. 2nd, 1907, 151 Fed. 168, 175. This principle is clearly recognized in the opinion of

[fol. 50] Judge Goddard in this case. The Bjornefjord, 1924 A. M. C. 740, 742.

I find, therefore, that these libelants would have received monthly in advance hire at the rate of £16,995 per calendar month, equivalent to $80,819.72 at the stipulated rate of exchange of $4.7555, Stipulation, p. 37, less an address commission of 2½% due charterers, clause 29, Respondent's Exhibit C, amounting to $2,020.49, or a net hire per month of $78,799.23. As the calendar month had thirty one days, the rate per day was $2,541.91, and as the period of detention was fourteen days, the libelants suffered a gross loss of $35,586.76.

In order to earn this hire, the libelants would have been obliged to pay the owner of the vessel monthly in advance £1,470 per calendar month which, at $4.7555 per pound, is equal to $6,990.47 per calendar month, $222.43 per day, and $3,114.02 for fourteen days. The deduction of the address commission of 2½%, $77.85, due charterers, clause 27, Libelants' Exhibit 5, leaves a net cost of $3,036.17.

As hire was payable monthly in advance under both charters, and as there is no evidence of the precise date when hire for August was actually paid to the owners, there is not any difference in interest dates to be taken into consideration in arriving at the net loss.

I find, therefore, that the libelants suffered damages in the principal sum of $32,550.57.

It remains to consider the question of interest, as to which there is a sharp dispute. The libelants claim interest from [fol. 51] August 1, 1917. The respondent contends that if any event interest should not be allowed for the period between the accrual of the cause of action and July 30, 1920, the date when the libel was filed, and that the delay in filing the libel is a sufficient reason to disallow all interest until the date of ascertainment of liability.

While the record in this reference does not contain any testimony concerning the reason for the delay in bringing suit, proctors for the libelants explained that the real reason was that the libelants, believing their best remedy to be against the owners of the vessel, brought proceedings against them. When their libel was dismissed the present suit was brought. The explanation offered by the proctors for the libelants is supported by the reported decision of

this Circuit Court of Appeals affirming the dismissal of the libel against the owners. The Bjornefjord, C. C. A. 2nd, 1921, 271 Fed. 682.

On the other hand there is not any evidence, or indeed any reason to believe, that the respondent has been prejudiced in any way by the delay; and the respondent ought not to complain of delay caused by the libelants' efforts to recover from someone else, particularly as the result was to permit the respondent to use the money which it is now obliged to pay, for a period, during the greater part of which money was worth considerably more than the legal rate of interest.

[fol. 52] In the present case I do not find any special circumstances for exercising the judicial discretion against the allowance of interest such as existed in The Arpillao, C. C. A. 2nd, 1920, 270 Fed. 426; The James McWilliams, C. C. A. 2nd, 1917, 240 Fed. 951; The Ada, 1916, 239 Fed. 363.

It is well settled that in general, interest on damages for detention as the result of collision runs from the time the vessel is returned to the service of the injured party. In re Great Lakes Dredging & Dock Co., 1917, 250 Fed. 916, 917; C. C. A. 1st, 1919, 256 Fed. 497, 505. The reason for this rule is that in the ordinary case actual payment of the freight or earnings would not have been made until, or after, the return of the vessel to service. In the present case, however, the libelants would have received payment of their hire from Norton, Lilly & Co. on August 1, 1917, because this hire was payable monthly in advance. If the libelants are to be placed as nearly as possible in the position they would have occupied had the tort not been committed, they should be compensated for the loss of use of the money which they would have received from the date on which they would have received it. Accordingly, interest is allowed from August 1, 1917.

The libelant's damages are, therefore, determined as follows:

| | |
|---|---|
| [fol. 53] Principal | $32,550 57 |
| Interest, August 1, 1917 to September 1, 1925 | 15,787 03 |
| Total as of September 1, 1925 | $48,337 60 |

New York, August 27, 1925.
Respectfully submitted,
Mark W. Maclay, Special Commissioner.

[fol. 54] Libelants' Exhibit No. 3

(Letter head of Geo. Hellesen, Inc.)

New York, July 17th, 1917.

Messrs. Norton, Lilly & Co., New York City.

S. S. "Bjornefjord"

Dear Sirs: Referring to charter party of this steamer, dated June 28th, 1917, this will serve to confirm our verbal understanding with your office to the effect that you are agreeable to taking this steamer when ready at New York, probably the end of July or early August, all other conditions of said charter party remaining in force, except that by this provision the stipulation of the layday date in said charter is hereby understood to be eliminated.

Yours very truly, Geo. Hellesen, Inc. E. B. Searle, Vice-Pres.

Libelants' Exhibit No. 4

(Letterhead of Geo. Hellesen, Inc.)

New York, July 7th, 1917.

Messrs. Norton Lilly & Company, New York City.

S. S. "Bjornefjord"

Dear Sirs: Time charter owners of this steamer advise us by telephone from Philadelphia this A. M. that they are

Form D 1.11

GEO. HELLIESEN,
Ship & Steamship Broker,
MARITIME BUILDING
5 & 10 BRIDGE STREET,
NEW YORK.
Cable Address—HELLIESEN, N. Y.

CHARLES CLAYDON & CO
3 CROSBY SQUARE
LONDON, E. C.

BAKER & IBSAHL
BERGEN, NORWAY

CODES
PRIVATE CODES
ALSO
WATKINS CODE & APPENDIX

# TIME CHARTER PARTY.

Respondentia
at C
2/3/15
M&S

**This Charter Party**, made and concluded upon in the City of New York, the 28th day of June 1917

between Flint, Goering & Company Ltd, Time chartered Owners of the good Steel Screw Steamship,

BJORNEFJORD of Bergen of 3680 tons gross register, and 2337 tons net register having engines of 307 nominal horse power, provided with proper certificate for hull and machinery, and classed about 6180 tons total deadweight on Lloyds Summer freeboard. 100 A.1. at Lloyds and Norton, Lilly & Company Charterers of the City of New York

Witnesseth, That the said owners agree to let, and the said charterers agree to hire the said steamship from the time of delivery, for about sixteen months from expected redelivery date of present charter, say September 1st, until say Dec. 29th. 1918, the expiration date of Owners 2 year charter with Flint Goering & Co. Ltd.

Steamer to be placed at the disposal of the Charterers, at New York

in such dock or at such wharf or place (where she may always safely lie afloat, at all times of tide), as the Charterers may direct, and being, on her delivery ready to receive cargo, and tight, staunch, strong and in every way fitted for the service, including dunnage as may be on board, having water ballast, steam winches and donkey boiler (and with full complement of officers, seamen, engineers and firemen for a vessel of her tonnage), and to be so maintained during the continuation of this Charter Party, to be employed in carrying lawful merchandise ~~live stock only, and on deck~~ including petroleum or its products, ~~and passengers on the customary conditions~~ in such lawful trades, between safe ports within the following limits:

To trade exclusively between United States, East Coast, including U.S.Ports in Gulf of Mexico, and South America (East coast) not south of Bahia Blanca, including all ports in West Indies but excluding West Indies ore trade and Nima Nima. All unsafe ports to be excluded in the above trading limits.

as the Charterers or their Agents shall direct, on the following conditions:

1. That the owners shall provide and pay for all provisions, wages and Consular shipping and discharging fees of the Captain, Officers, Engineers, Firemen and Crew; shall pay for the insurance of the vessel, also for all the cabin, deck, engine room and other necessary stores, and maintain her in a thoroughly efficient state, in hull and machinery for and during the service.

2. That the Charterers shall provide and pay for all the Coals, Fuel, Port Charges, Pilotages, Agencies, Commissions, Consular Charges (except those pertaining to the Captain, Officers and Crew), and all other charges whatsoever except those before stated. including Galley coal

3. That the Charterers shall accept and pay at once on delivery of Steamer for all Coal in the Steamer's Bunkers on delivery, and the Owners shall, on expiration of this Charter Party, pay for all Coal left in the Bunkers, each at the current market prices at the respective Ports where she is delivered to them.

4. That the Charterers shall pay for the use and hire of said Vessel Sixteen thousand, nine hundred and ninetyfive Pounds------ British Sterling £16.995 per Calendar Month, commencing on and from the day of her delivery, as aforesaid, and at and after the same rate for any part of a month; hire to continue until her delivery, with clean holds to the Owners (unless lost) at at a United States Atlantic port north of Cape Hatteras

5. That should the Steamer be on her voyage towards port of return delivery at the time a payment of hire becomes due, said payment shall be made for such a length of time, as the Owners or their Agents and Charterers, or their Agents may agree upon as the estimated time necessary to complete the voyage, and when the Steamer is delivered to Owners' agents any difference shall be refunded by steamer or paid by Charterers, as the case may require.

6. Payment of the said hire to be made in cash monthly in advance in New York at the current rate of exchange for approved Bankers demand bills on London, in U.S.Gold or its equivalent.

and in default of such payment or payments as herein specified, the Owners shall have the faculty of withdrawing the said steamer from the service of the Charterers, without prejudice to any claim, they, the Owners, may otherwise have on the Charterers, in pursuance of this Charter.

7. ~~The owners to rent U.S. Passenger Inspectors to be borne by Charterers. Charterers to pay in embarking passengers at the rate of 9/8d. Sterling per day for first class passengers, 6/8d for second class passengers and 3/4 for laborers or steerage passengers.~~

8. The cargo or cargoes to be laden and/or discharged in any dock, or at any wharf or place that the Charterers or their agents may direct, provided the steamer can always safely lie afloat at any time of tide.

9. That the whole reach of the vessel's holds, deck and usual places of loading, and accommodation of the ship (not more than she can reasonably stow and carry) shall be at the Charterers' disposal, reserving only proper and sufficient space for ship's officers, crew, tackle, apparel, furniture, provisions, stores and fuel.

10. That the Captain shall prosecute his voyages with the utmost dispatch, and shall render all customary assistance with ship's crew, tackle and boats. That the Captain (although appointed by the Owners), shall be under the orders and direction of the Charterers as regards employment, agency or other arrangements, and the Charterers hereby agree to indemnify the Owners from all consequences or liabilities that may arise from the Captain signing Bills of Lading, or otherwise complying with the same.

11. That if the Charterers shall have reason to be dissatisfied with the conduct of the Captain, Officers or Engineers, the Owners shall on receiving particulars of the complaint, investigate the same, and if necessary, make a change in the appointments.

12. That the Charterers shall have permission to appoint a super-cargo who shall accompany the steamer and see that voyages are prosecuted with the utmost dispatch. He is to be furnished, free of charge, with first-class accommodations, and same fare as provided for Captain's table.

13. That the Master shall be furnished, from time to time, with all requisite instructions and sailing directions, and shall keep a full and correct Log of the voyage or voyages which are to be patent to Charterers or their Agents, and to furnish the Charterers, their Agent or Super-cargo, when required, a true daily copy of Log, showing the course of the steamer and distance run, and the consumption of Coal and to take every advantage of Wind by using the Sails with a view to economize the expenditure of Coal.

14. That the Master shall use all diligence in caring for the ventilation of the cargo.

15. That in the event of the loss of time from deficiency of men or stores, breakdown of machinery, stranding, fire or damage preventing the working of the vessel for more than twenty-four running hours, the payment of the hire shall cease until she be again in an efficient state to resume her service; but should she in consequence put in to any port, other than that to which she is bound, the Port Charges and Pilotages at such Port shall be borne by the Steamer's Owners, but should the vessel be driven into Port, or to anchorage by stress of weather, or from any accident to the cargo, such detention or loss of time shall be at the Charterer's risk and expense.

16. That should the vessel be lost, freight paid in advance not earned (reckoning from the date of her last being heard of) shall be returned to the Charterers.

17. The act of God, enemies, fire, restraint of princes, rulers and people and all dangers and accidents of the seas, rivers, machinery, boilers and steam navigation, and errors of navigation, throughout this Charter Party, always mutually excepted.

18. That should any dispute arise between the Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision, or that of any two of them shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of Court.

19. That the Owners shall have a lien upon all cargoes, and all sub-freights, for any amounts due under this Charter, and the Charterers to have a lien on the Ship, for all moneys paid in advance and not earned.

20. ~~That the Charterers have the option, at any time during this Charter, of purchasing the said vessel for the sum of~~ Charterers to pay Owners war risk insurance premium over 1% monthly on a valuation of Two Million Kroners

21. That as the steamer may be from time to time employed in tropical waters during the term of this Charter, steamer is to be docked, bottom cleaned and painted whenever Charterers and Master think necessary, but at least once in every six months, and payment of the hire to be suspended until she is again in proper state for service.

22. That the Owners are to provide ropes, falls, slings and blocks, necessary to handle ordinary cargo up to three tons (of 2240 lbs. each) in weight, also lanterns for night work.

23. Steamer to work night and day, if required by Charterers, and all steam winches to be at Charterer's disposal during loading and discharging, and steamer to provide ~~[illegible]~~ men if required, ~~while~~ both day and night as required, Charterers agreeing to pay extra expense if any incurred by reason of night work, at the current local rate. (after deducting crew's portion and expenses)

24. That all derelicts and salvage shall be for Owners' and Charterers' equal benefit. General average, if any, to be according to York-Antwerp Rules 1890.

25. ~~That the Charterers shall have the option of continuing this Charter for a further period of~~ Charterers to provide necessary dunnage and shifting boards, but owners to allow them use of dunnage and shifting boards on steamer. Ship not responsible for damage or shortage of cargo.

~~on giving notice thereof to the Owners or their Agents~~ days previous to the expiration of the first-named term, or any declared option.

26. Charterers to have the liberty of subletting the steamer, if required by them, but charterers remain responsible for fulfilment of this Charter.

27. That if required by Charterers, time not to commence before August 15th. 1917 and should steamer not be ready for delivery at port of delivery on or before September 15th. 1917 Charterers or their Agents to have the option of cancelling party this Charter, at any time not later than the day of steamer's readiness.

28. It is also mutually agreed, that this Charter is subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States, approved on the 13th day of February, 1893, and entitled "An Act relating to Navigation of Vessels, etc."

29. ~~A freight brokerage of~~ All address commission of 2½ per cent. is due to Norton, Lilly & Co. as freight carrier and a commission of ~~five~~ per cent. on the estimated amount of Freight, is due and payable by Owners, on signment hereof to GEO. HELLIESEN, Ship lost or not lost, ~~and on any extension or renewal of this Charter or purchase of vessel.~~

30. Penalty for non-performance of this Contract, estimated amount of damages.

Steamer not to be re-chartered to Tweedie Trading Company

FLINT, GOERING & CO. Ltd.
(sgd) George Flint
Chairman

(sgd) T.J.Baus

Witness to the signature of

~~By cable authority from~~

dated ..... 191

(sgd) NORTON, LILLY & COMPANY

I HEREBY CERTIFY the above to be a true copy of the original Charter Party in my possession. GEO HELLIESEN INC

the Captain subject to a commission of 2½, such advances to be deducted from the next hire.

I Hereby Certify the above to be a true copy of the original Charter Party in my possession. GEO HELLIESEN

winches and donkey boiler, (and with full complement of officers, seamen, engineers and firemen for a vessel of her tonnage), and to be so maintained during the continuation of this Charter Party, to be employed in carrying lawful merchandise, ~~live stock under and/or on deck~~ including petroleum or its products, ~~and passengers so far as steamer's license will allow~~ in such lawful trades, between safe ports within the following limits:

**To trade exclusively between United States, East Coast, including U.S.Ports in Gulf of Mexico, and South America (East coast) not south of Bahia Blanca, including all ports in West Indies but excluding West Indies ore trade and Nima Nima. All unsafe ports to be excluded in the above trading limits.**

as the Charterers or their Agents shall direct, on the following conditions:

1. That the owners shall provide and pay for all provisions, wages and Consular shipping and discharging fees of the Captain, Officers, Engineers, Firemen and Crew, shall pay for the insurance of the vessel, also for all the cabin, deck, engine room and other necessary stores, and maintain her in a thoroughly efficient state, in hull and machinery for and during the service. **including Galley coal**

2. That the Charterers shall provide and pay for all the Coals, Fuel, Port Charges, Pilotages, Agencies, Commissions, Consular Charges (except those pertaining to the Captain, Officers and Crew), and all other charges whatsoever except those before stated.

3. That the Charterers shall accept and pay at once on delivery of Steamer for all Coal in the Steamer's Bunkers on delivery, and the Owners shall, on expiration of this Charter Party, pay for all Coal left in the Bunkers, each at the current market prices at the respective Ports where she is delivered to them.

4. That the Charterers shall pay for the use and hire of said Vessel **Sixteen thousand, nine hundred and ninetyfive**

**Pounds------** British Sterling **£16.995** per Calendar Month, commencing on and from the day of her delivery, as aforesaid, and at and after the same rate for any part of a month, hire to continue until her delivery, with clean holds to the Owners (unless lost) at **at a United States Atlantic port north of Cape Hatteras**

5. That should the Steamer be on her voyage towards port of return delivery at the time a payment of hire becomes due, said payment shall be made for such a length of time, as the Owners or their Agents and Charterers, or their Agents may agree upon as the estimated time necessary to complete the voyage, and when the Steamer is delivered to Owners' agents any difference shall be refunded by steamer or paid by Charterers, as the case may require.

6. Payment of the said hire to be made in cash **monthly** in advance in New York at the ~~same~~ **current rate of exchange for approved Bankers demand bills on London, in U.S.Gold or its equivalent.**

and in default of such payment or payments as herein specified, the Owners shall have the faculty of withdrawing the said steamer from the service of the Charterers, without prejudice to any claim, they, the Owners, may otherwise have on the Charterers, in pursuance of this Charter.

7. ~~Owners consent to use U.S. Passenger Inspectors to be borne by Charterers. Charterers to pay for outcoming passengers at the rate of 5/8d. Sterling per day for first class passengers, 3/4 for second class passengers and 1/2 for laborers or steerage passengers.~~

8. The cargo or cargoes to be laden and/or discharged in any dock, or at any wharf or place that the Charterers or their agents may direct, provided the steamer can always safely lie afloat at any time of tide.

9. That the whole reach of the vessel's holds, deck and usual places of loading, and accommodation of the ship (not more than she can reasonably stow and carry) shall be at the Charterers' disposal, reserving only proper and sufficient space for ship's officers, crew, tackle, apparel, furniture, provisions, stores and fuel.

10. That the Captain shall prosecute his voyages with the utmost dispatch, and shall render all customary assistance with ship's crew, tackle and boats. That the Captain (although appointed by the Owners), shall be under the orders and direction of the Charterers as regards employment, agency or other arrangements, and the Charterers hereby agree to indemnify the Owners from all consequences or liabilities that may arise from the Captain signing Bills of Lading, or otherwise complying with the same.

11. That if the Charterers shall have reason to be dissatisfied with the conduct of the Captain, Officers or Engineers, the Owners shall on receiving particulars of the complaint, investigate the same, and if necessary, make a change in the appointments.

12. That the Charterers shall have permission to appoint a super-cargo who shall accompany the steamer and see that voyages are prosecuted with the utmost dispatch. He is to be furnished, free of charge, with first-class accommodations, and same fare as provided for Captain's table.

13. That the Master shall be furnished, from time to time, with all requisite instructions and sailing directions, and shall keep a full and correct Log of the voyage or voyages which are to be patent to Charterers or their Agents, and to furnish the Charterers, their Agent or Super-cargo, when required, a true daily copy of Log, showing the course of the steamer and distance run, and the consumption of Coal and to take every advantage of Wind by using the Sails with a view to economize the expenditure of Coal.

14. That the Master shall use all diligence in caring for the ventilation of the cargo.

15. That in the event of the loss of time from deficiency of men or stores, breakdown of machinery, stranding, fire or damage preventing the working of the vessel for more than twenty four running hours, the payment of the hire shall cease until she be again in an efficient state to resume her service; but should she in consequence put in to any port, other than that to which she is bound, the Port Charges and Pilotages at such Port shall be borne by the Steamer's Owners, but should the vessel be driven into Port, or to anchorage by stress of weather, or from any accident to the cargo, such detention or loss of time shall be at the Charterer's risk and expense.

16. That should the vessel be lost, freight paid in advance not earned (reckoning from the date of her last being heard of) shall be returned to the Charterers.

17. The act of God, enemies, fire, restraint of princes, rulers and people and all dangers and accidents of the seas, rivers, machinery, boilers and steam navigation, and errors of navigation, throughout this Charter Party, always mutually excepted.

18. That should any dispute arise between the Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision, or that of any two of them shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of Court.

19. That the Owners shall have a lien upon all cargoes, and all sub-freights, for any amounts due under this Charter, and the Charterers to have a lien on the Ship, for all moneys paid in advance and not earned.

20. ~~That the Charterers have the option, at any time during the Charter, of purchasing the said vessel for the sum of~~ **Charterers to pay Owners war risk insurance premium over 1% monthly on a valuation of Two Million Kroners.**

21. That as the steamer may be from time to time employed in tropical waters during the term of this Charter, steamer is to be docked, bottom cleaned and painted whenever Charterers and Master think necessary, but at least once in every six months, and payment of the hire to be suspended until she is again in proper state for service.

22. That the Owners are to provide ropes, falls, slings and blocks, necessary to handle ordinary cargo up to three tons (of 2240 lbs. each) in weight, also lanterns for night work.

23. Steamer to work night and day, if required by Charterers, and all steam winches to be at Charterer's disposal during loading and discharging, and steamer to provide ~~sufficient power~~ for night work, ~~same both by~~ day and night as required, Charterers agreeing to pay extra expense if any incurred by reason of night work, at the current local rate **(after deducting crew's portion and expenses)**

24. That all derelicts and salvage shall be for Owners' and Charterers' equal benefit. General average, if any, to be according to York-Antwerp Rules 1890.

25. ~~That the Charterers shall have the option of continuing this Charter for a further period of~~ **Charterers to provide necessary dunnage and shifting boards, but owners to allow them use of dunnage and shifting boards on steamer. Ship not responsible for damage or shortage of cargo.**

on giving notice thereof to the Owners or their Agents ~~days~~ days previous to the expiration of the first-named term, or any declared option.

26. Charterers to have the liberty of subletting the steamer, if required by them, **but charterers remain responsible for fulfilment** and should steamer not be ready cl

27. That if required by Charterers, time not to commence before **August 15th.1917** and should steamer not be ready for delivery at port of delivery on or before **September 15th.1917** Charterers or their Agents to have the option of cancelling pe this Charter, at any time not later than the day of steamer's readiness.

28. It is also mutually agreed, that this Charter is subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States approved on the 13th day of February, 1893, and entitled "An Act relating to Navigation of Vessels, etc."

29. ~~A freight brokerage of~~ **And a commission of** ~~five~~ per cent. on the ~~freight brokerage of~~ per cent. is due to **Norton, Lilly & Co. as freight earned** estimated amount of Freight, is due and payable by Owners, on signment hereof to GEO. HELLIESEN. Ship lost or not lost, ~~if not on any extension or renewal of this Charter or purchase of vessel.~~

30. Penalty for non performance of this Contract, estimated amount of damages.

Steamer not to be re-chartered to Tweedie Trading Company

FLINT, COERING & CO.Ltd.
(sgd) George Flint
Chairman

~~By cable authority from~~

(sgd) T.J.Baus — Witness to the signature of

dated ..... 191

(sgd) NORTON, LI... & COMPANY
Agent.

(sgd) Warren S.Gulick — Witness to the signature of

If the owners shall have exercised due diligence to make the steamer in all respects seaworthy and to have her properly manned, equipped and supplied, it is herety agreed that in case of danger, damage, disaster, resulting from faults or errors in navigation, or in the management of the steamer, or from any latent defect in the steamer, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of the shipment or at the beginning of the voyage (provided the latent defect or the unseaworthiness was not discoverable by the exercise of due diligence, the consignees or owners of the cargo shall, nevertheless, pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril, all with the same force and effect, and to the same extent, as if such danger, damage or disaster had not resulted from or been occasioned by faults or errors in navigation, or in the management of the vessel or any latent defect or unseaworthiness.
If Underwriters after Average condemn steamer, Charter to be null and void.
Wherever the word Owners appear in this Charter, it is understood to mean Time Chartered Owners.

56.

[fol. 55] in receipt of a cable from Houlders, London, inquiring if time charter owners are agreeable to accepting redelivery of this steamer North of Hatteras about the end of July. The steamer is reported as having sailed today from Santos to Hampton Roads.

Time charter owners are agreeable to Houlders making redelivery to them about the end of this month, under certain conditions, and will begin negotiations with Houlders to so arrange provided you are agreeable to accepting delivery of steamer, under your time charter, when vessel is ready. If you are agreeable to such an arrangement, we shall be pleased to have your immediate advices to that effect, in order that we may telegraph Philadelphia this A. M. thereby giving time charter owners the opportunity of cabling London today.

As you may be aware, Houlders have, under their present time charter, until the end of August to make redelivery and we presume you would rather agree to delivery the end of this month than have Houlders engage steamer in probably a West India round upon completion of present voyage, which might make her delivery to you in September.

Yours very truly, Geo Hellieson, Inc. E. B. Searle, Vice-Pres.

(Here follows Respondent's Exhibit C, marked side folio page 56.)

[fol. 57] In United States District Court

[Title omitted]

Final Decree—September 30, 1925

An interlocutory decree having been duly entered herein on the 16th day of June, 1924, whereby this matter was referred to Mark W. Maclay, Jr., Esq., as Commissioner, to determine libellants' damages and report the same to this court, and said Commissioner, after hearings duly held, having assessed the libellants' damages at the sum [fol. 58] of $32,560.57, with interest from August 1, 1917, to

September 1, 1925, amounting to $15,387.03, making a total of $48,337.60, and having filed his report with the Clerk of this Court on the 27th day of August, 1925; and the libellants' costs having been duly taxed at the sum of $477.57.

Now on motion of H. Alan Dawson and Burlingham, Veeder, Masten & Featey, proctors for libellants, it is

Ordered that the Commissioner's report, filed herein on the 27th day of August, 1925, be and the same hereby is in all respects confirmed; and it is further

Ordered, adjudged and decreed that the libellants, George Flint, Samuel W. Collins and Ludwig T. Brehm, doing business under the name of Flint, Goering & Co., Ltd., a limited Partnership, recover of and from the respondent, Robins Dry Dock & Repair Company the sum of Forty eight thousand three hundred and thirty seven and 60/100 Dollars ($48,337.60) damages, as reported by said Commissioner, with interest thereon from September 1, 1925, to the date of the entry of this decree, amounting to Two hundred forty one and 69/100 Dollars ($241.69), together with the sum of Four Hundred Seventy seven and 57/100 Dollars ($477.57), costs as taxed, making in all the sum of Forty nine Thousand Fifty six and 86/100 Dollars ($49,056.86), with interest thereon until paid, and that said libellants have execution therefor, and it is further

[fol 30] Ordered that unless this decree be satisfied or an appeal taken therefrom within ten days after the service of a copy hereof, with notice of entry, upon the proctors for the respondent herein, the respondent and its stipulators cause the engagements of their respective stipulations to be performed, or execution may issue against their goods, chattels and lands to satisfy this decree.

F. A. Winslow, U. S. D. J.

In United States District Court

[Title omitted]

Notice of Appeal

Sirs: Please take notice that the respondent hereby appeals to the United States Circuit Court of Appeals for [fol 31] the Second Circuit, from the final decree entered

herein on September 30, 1925, and from each and every part of said decree.

Yours, &c., Barry, Wainwright, Thacher & Symmers, Proctors for Respondent.

Dated New York, October 14, 1925.

To H. Alan Dawson, Esq., Burlingham, Veeder, Masten & Fearey, Esqs., proctors for libelants; Alex. Gilchrist, Jr., Esq., clerk.

[fol. 61] In United States District Court

[Title omitted]

Assignments of Error

The respondent-appellant assigns as errors of the District Court:

1. The finding and decision that a suit for the recovery of damages growing out of injury to a vessel while in a graving dock and outside navigable waters, is within the admiralty jurisdiction of the court.

2. The finding and decision that under the allegations of the libel the libelants were entitled to recover against the respondent in [illegible]

3. The finding and decision that any negligence on the part of the respondent was the proximate cause of any loss to the libelants.

4. The finding and decision that the contract between the vessel owners and the respondent for the repair of the [illegible] vessel was a contract for the benefit of the libelants.

5. The finding and decision that the libelants had a property interest in the vessel at the time of the injury of said vessel.

6. The finding and decision that the respondent was under any greater legal obligation to the libelants in the premises than to refrain from intentionally, wilfully or maliciously injuring the libelants.

7. The finding and decision that the libelants, as charterers, had a property interest in the "Bjornefjord" and might recover from the respondent on the ground that negligent performance of the contract between respondent and the vessel owners (to which contract libelants were not parties), deprived the libelants of the use of the vessel.

8. The refusal of the court to find and decide that any loss of profits sustained by the libelants as charterers growing out of the injury of the vessel while the vessel was off hire pursuant to the provisions of the charter between the owners and the libelants, resulted proximately from the limitations of the libelants' charter with the owners and not from any negligence on the part of the respondent.

9. The finding and decision that on the pleadings and the proof the libelants were entitled to recover against the respondent.

Barry, Wainwright, Thacher & Symmers, Proctors for Respondent-Appellant

[fol. 63] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Burlingham, Veeder, Masten & Fearey, Proctors for Libellants. Barry, Wainwright, Thacher & Symmers, Proctors for Respondent.

Dated December , 1923.

[fol. 64] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 65] In United States Circuit Court of Appeals for the Second Circuit

George Flint, Samuel W. Collins, and Ludwig T. Brehm, Doing Business under the Name of Flint Goering & Co., Ltd., a Limited Partnership, Libellants-Appellees,

against

Reeds Dry Dock & Repair Company, Respondent-Appellant

Before Rogers, Hand, and Mack, Circuit Judges

H. Alan Dawson, Burlingham, Veeder, Masten & Fearey, for libellants-appellees; Roscoe H. Hupper, William J. Dean, counsel.

Barry Wainwright, Thacher & Symmers, for respondent-appellant; James K. Symmers, advocate.

Opinion

Mack, Circuit Judge:

This proceeding arose out of the same accident on which the libel in rem considered in The Bjornefjord, 271 Fed. [fol. 66] 682, was based. We there held that the time charterer had no cause of action in rem for the estimated value of the use of the vessel for fourteen days, due to the negligence of the instant respondent in letting the spare propeller fall while installing it in the ship. The basis of that decision was that instant respondent was an independent contractor properly selected by the owner; that under the charter party the steamer was properly withdrawn for repairs and the only obligation of the owner was to return her as soon as she should have been put into an efficient state to resume service, payment of hire ceasing during the interval.

After that decision the present libel was filed to recover these same damages from respondent. Negligence and the resulting fourteen days' delay are conceded; liability is, however, denied; in contract, because respondent was a stranger to the charter party and libellants strangers to the contract for repairs; in tort, because the steamship was at no time in the possession of or being used by libellants during the two weeks' delay. Respondent further alleges

that the master of the steamship made claim against it for $4,271.21, "the amount of the alleged damages accruing to said master's principals by reason of the delay of said steamship," entailed by defendant's negligence, which sum respondent paid December 7, 1917, at which date the master executed a general release, "by which release said steamship, her owners, etc., and said master discharged respondent from all actions, damages, claims and demands [fol. 67] whatsoever, and especially of and from all claims and demands arising out of towage and or detention of said steamship in any way due to the breaking of said spare propeller on said vessel on or about July 31, 1917." Respondent further alleges that at the time of payment it had "no knowledge nor any information as to the exact ownership of said steamship Bjornefjord or as to her relations by charter party or otherwise to the libellants in this case, and in making said payment to said master and in taking the release executed by said master this respondent procured said master to execute said release, as above stated, in full settlement of all the claims of said master, as master or otherwise, and all claims of the owners, etc., of said steamship Bjornefjord, to wit, all parties having any property interest in said steamship."

It appears from the evidence that the damages claimed, $23,068.08, represented the difference between the market value of the steamer for the fourteen-day loss of use, and $2,517.76 or thereabouts, the charter hire for that period; further, that on or about August 10, 1917, nearly four months prior to the execution of the release by the master, respondent was notified by appellants of their claim as "time chartered owners" at the rate of approximately $3,000.00 per month for the period of detention. In the notification libellants stated "we must accordingly advise you that we shall hold you liable and responsible for our damages either direct to us or through the owners. We will submit a statement of the damages and claims so soon as the amount is definitely known."

[fol. 68] At the trial it was agreed that the master, if called, would testify that he was acting for the owners and made a settlement of their claim with respondent, and that in making such settlement he did not put forward the claim of the time charterers and did not pretend to be settling that claim.

The matter is now before us on an appeal from a decree in favor of libellants for the principal sum of $32,550.57, with interest thereon from August 1, 1917, and costs.

(1) There is clearly no direct liability in contract. Libellants were not parties to the repair contract, and inasmuch as they were not and were not intended to be the sole beneficiaries thereof, or indeed in any respect beneficiaries, they did not become privies thereto or entitled to sue for breach thereof, even under the most liberal rules that permit third parties to sue on a contract made for their benefit.

Neither Pennsylvania Cement Co. v. Bradley Contracting Co., 7 Fed. (2d) 823, nor Town of Readsboro v. Hoosac Tunnel & W. R. Co., 6 Fed. (2d) 733, is in point. In the Cement Company case the agreement between the City and the contractor expressly provided that the latter should be solely responsible for all physical injuries to persons or property on account of the performance of the work; in the Readsboro case the defendant, while originally no party to the contract sued upon, expressly assumed the obligations of its predecessor in title.

[fol. 69] (2) As to a liability in tort, we are met at the threshold with an objection to the jurisdiction of a court of admiralty, based on the contention that the tort, if any, having been committed while the ship was in drydock, was not "committed and effective on navigable waters." (Gonsalves v. Morse Drydock & Repair Co., 266 U. S. 171, 172). We feel ourselves however, concluded as to this contention by The Jefferson, 215 U. S. 130, and The Robert W. Parsons, 191 U. S. 17.

(3) Judge Mayer, sitting in the District Court, held in The Aquitania, 270, Fed. 239, that a time charterer could recover his damages for the loss of use of a vessel during the period of its repair in a libel in rem against the ship which had negligently collided with and damaged the charterer's vessel, and this though the owner of the injured vessel likewise had a libel pending in the same Court to recover his damages, consisting of repair expense and loss of use during the period of repairs.

In Hines, Agent v. Sangstad S. S. Co., et al., (C. C. A. 1), 296 Fed. 502, under a joint libel filed by the owner and the time charterer of the vessel damaged by collision, the

time charterer while not entitled to claim that the vessel was off hire during the repair time, recovered from the damaging vessel the amount of charter hire that it paid to the owner for the period of delay.

In The S. S. Binghampton case, decided by Judge Mayer and discussed by him in his opinion in The Aquitania, the time charterer recovered the difference between the market [fol. 70] value of the use of the damaged vessel for the period of the delay, less the very much smaller charter hire for the same period. And in The Beaver, 219 Fed. 139, a similar right of recovery in the time charterer was assumed.

Without adopting Judge Mayer's language that "the ship * * * in so far as its capacity to earn freight is concerned * * * is the charterer's," but on the contrary adhering to the views expressed by us in Booth American Shipping Co. v. Importers & Exporters Insurance Co., 9 Fed. (2d) 704, that "no property interest, not even possession, had been created in the vessel as an agent" of the time charterer, we concur in the result reached in the Aquitania case and the cases cited therein, that the damaged ship in those cases was in the active service of the charterer, while in the instant case it was off hire at the time of the injury, furnishes no basis for distinguishing the cases. The charter period had not expired; she was properly off hire but would have been in active service again but for the injury; even active service gave the time charterer no property right in or possession of the vessel. The difference in the facts furnishes no test of respondent's liability or of the measure of damages, even though it may result in a different apportionment of damages; if the vessel be temporarily off hire, the total damage would be divisible, the owner receiving an amount equivalent to the lost charter hire, the charterer the difference between the market value of the use and the charter hire; if not off hire, [fol. 71] the entire damages for the delay would go to the charterer, the measure of damages, however, in both cases would be the market value of the use of the vessel for the period of delay.

Clearly, the result reached involves no injustice to respondent. Its liability for its tortious act is the actual damage done to the combined interests in the ship. The mea-

ure of the total recovery is the market value of the loss of the use. If there had been no charter, the entire loss would have been sustained by the owner; therefore he could have recovered that amount for himself. The wrongdoer has no interest in and should not benefit because of the contractual obligations of the shipowner to the charterer or the absence of any liability of the owner to the charterer for respondent's negligence. This non liability of the owner is neither a test nor a measure of the wrongdoer's liability, for though the owner be not directly liable to the charterer, he may nevertheless be liable over to him as a trustee for so much of the recovery from the wrongdoer as exceeds his own personal loss. In The Winkfield (1902), Probate, 42, despite the fact that the Postmaster General, because of his official immunity was free from liability to the owners of mail matter destroyed by the negligence of a ship that collided with the vessel on which it was being carried, the Court of Appeals held that he was nevertheless entitled to the full value of the material destroyed. And in Rodocanachi v. Milburn, 18 Q. B. Div. 67, the owner of the goods lost through negligence was entitled to recover [fol. 72] the full market value from the wrongdoer although he was bound under a contract to sell them below that value if they had arrived safely at the port of destination. See, too, 39, Harvard Law Review, p. 760.

In the very interesting opinion of Collins, M. R. in The Winkfield, supra, the history of the relative rights of bailor and bailee against wrongdoers is pointed out. Originally only the bailee could sue; in the later development either bailor or bailee could bring the action. If the bailee sued, he would recover the entire value of the property. But though he be not directly liable to his bailor for the negligence of the third person, he, like the Postmaster General in The Winkfield, held the excess of recovery over his own personal loss in trust for the bailor or owner of the mail matter respectively.

It is unnecessary to determine in the instant case whether the charterer's right to recover for his loss is direct against the wrongdoer, enforcible by a libel independent of that which the shipowner but for the release could have brought for his damages, or whether it is indirect based upon the

equitable obligation of the shipowner to the charterer, in analogy to the bailment and the Winkfield case; for no error is assigned because of the failure to join the shipowner as libellant pursuant to the practice adopted in the Sangstad case, supra. Even if the the right be derivative and equitable in its nature, the settlement made and the release accepted, as it was in this case with full knowledge [fol. 73] of libellants' claim, could afford no defense in admiralty, the more so when, as here, neither party intended it to operate as a release of more than the owner's own personal damages.

It is urged, however that the loss suffered by libellants cannot be deemed the proximate result of respondent's negligence. It is indeed true that ordinarily the damage suffered by one whose interest in the party or thing directly injured is due to some contractual relation, is deemed too remote to permit recovery against the wrongdoer, unless the wrongful act be done with intent to affect the contractual relation. Typical cases are Conn. M. L. Ins. Co. v. N. Y. & N. H. R. R. Co., 25 Conn. 265, in which a life insurance company was denied recovery against one who had killed the insured; and Taylor v. Neri, 1 Esp. N. P. 386, in which a theatre manager was held not entitled to recover against one, who by assaulting an actor, had disabled him from fulfilling his engagement with plaintiff. See, too, Brink v. Wabash Ry. Co., 160 Mo. 87; Dale v. Grant 34 N. J. L. 142; Simpson v. Thompson, L. R. 3 A. C. 279. In Remorguage v. Bennetts (1911), 1 K. B. 243, recovery was denied the owners of a steamtug for the loss of remuneration that they would have earned if a towage contract then in process of completion had not been prevented by respondent's negligent collision with and sinking of the ship that was being towed. In all of these cases the damage to plaintiff or libellant was deemed too remote.

The conceptions of remote result and proximate cause are, however, not fixed and permanent; in the development [fol. 74] of legal principles and their adjustment to social needs the boundary lines have been and will continue to be extended. In our day the damages suffered by one who eats diseased food intended by the manufacturer to be marketed as pure food are deemed to be the proximate result of the manufacturer's negligence and therefore recoverable from

the manufacturer, even though the injured person had direct relations only with an intermediate and dependently contracting dealer. Ketterer v. Armour & Co., 247 Fed. 921. See, too, Johnson v. Cadillac Motor Car Co., 261 Fed. 878.

Furthermore, unlike the insurance, towing and analogous cases, recognition of libellants's right of action involves no extension of responsibility for results beyond those reasonably to be anticipated. The damages which respondent must meet are limited to reimbursement for the proximate results of its negligence. As this, however, has directly affected several parties, each is entitled to his just share of the total amount.

Through illness, Judge Rogers was prevented from participating in this decision.

Decree affirmed.

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[fol. 75] In United States Circuit Court of Appeals

Appeal from the District Court of the United States for the Southern District of New York

[Title omitted]

Judgment. Filed June 16, 1926

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On Consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court [fol. 76] be and it hereby is affirmed with interest and costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

L. H. J. W. M.

[File endorsement omitted.]

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[fol. 77] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 78] In Supreme Court of the United States

Order Allowing Certiorari—Filed October 25, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office Supreme Court, U. S.
FILED
WM. R. STANSBURY
CLERK

# Supreme Court of the United States.

OCTOBER TERM, 1926.

No. [redacted] 102

The petition of Robins Dry Dock & Repair Company for a writ of certiorari directed to the Circuit Court of Appeals for the Second Circuit to bring before this court the case of:

GEORGE FLINT, SAMUEL W. COLLINS AND LUDWIG T. BRUHN, DOING BUSINESS UNDER THE NAME OF FLINT GOERING & CO., LTD., A LIMITED PARTNERSHIP,

*Libelants-Appellees,*

vs.

ROBINS DRY DOCK & REPAIR COMPANY,

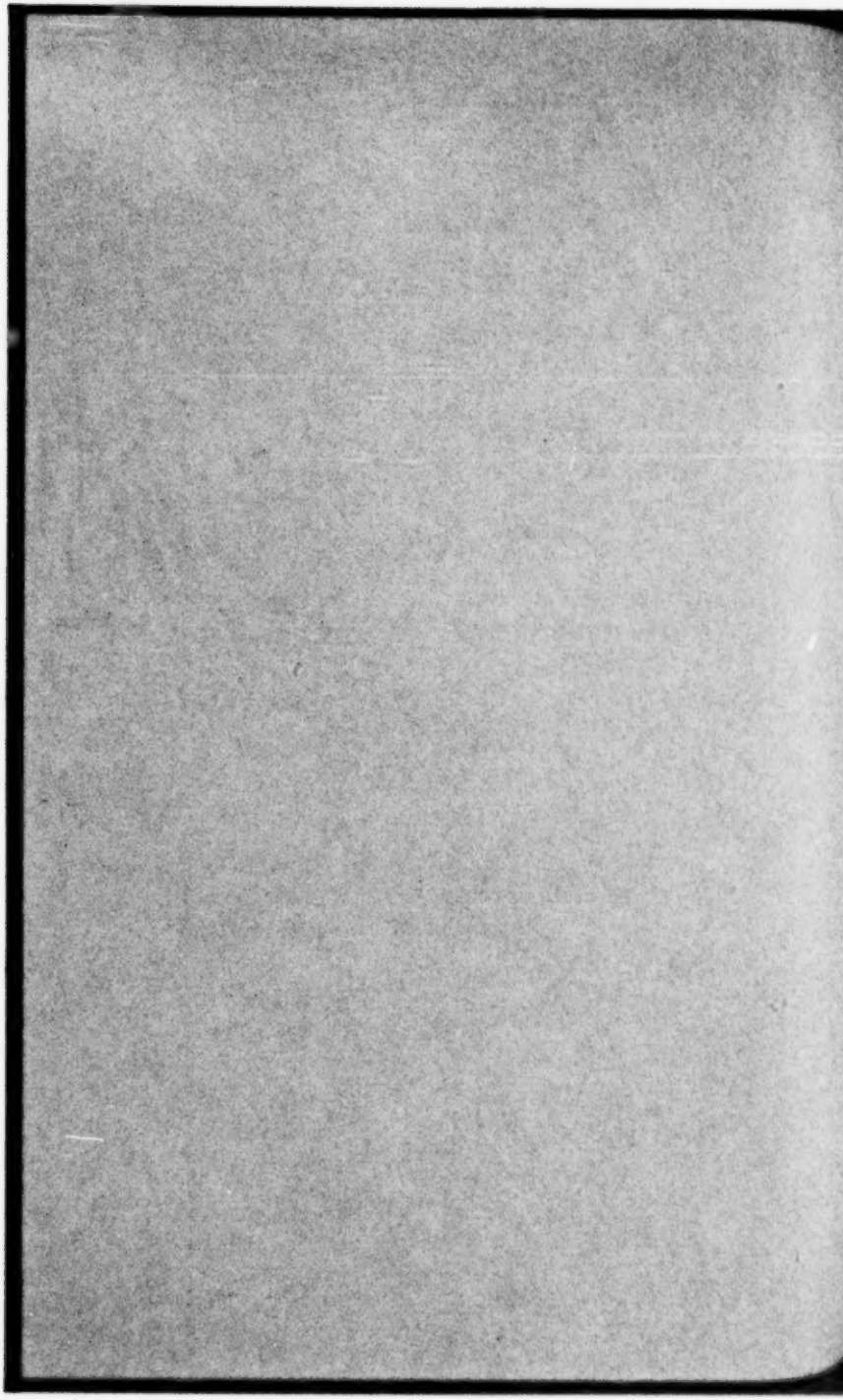
*Respondent-Appellant.*

## PETITION AND BRIEF.

JAMES E. SUMNER,
JOHN C. CRAWLEY,
*for the Petitioner.*

120 Pet. 1926

[redacted]



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# Supreme Court of the United States.

OCTOBER TERM, 1926.

No. .....

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The petition of Robins Dry Dock & Repair Company for a writ of certiorari directed to the Circuit Court of Appeals for the Second Circuit to bring before this court the case of:

GEORGE FLINT, SAMUEL W. COLLINS and LUDWIG T. BREHM, doing business under the name of FLINT GOERING & CO., LTD., a limited partnership,

Libelants Appellees,

vs.

ROBINS DRY DOCK & REPAIR COMPANY,

Respondent Appellant.

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## PETITION.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Your petitioner prays for a writ of certiorari to review a final decree in admiralty by the Circuit Court of Appeals for the Second Circuit rendered on June 14, 1926 (Record, p. 75), affirming a decree of the District Court for the Southern District of New York.

### Statement.

All of the facts were stipulated at the trial.

The petitioner, a ship repair company, contracted with the owners of the Steamship "Bjornefjord" to repair that

vessel (fol. 27). In the performance of the contract, the petitioner's workmen negligently injured the steamer (while she lay in a graving dock) so that she was out of commission for a period of two weeks beyond the time when she would otherwise have been restored to the owners (p. 66).

Liability for the owners' loss was not disputed (p. 66). The petitioner settled the owners' claim and obtained a release (p. 66).

But the petitioner denied liability to the libelants appellees, who were time charterers of the vessel. Their charterparty was not a demise (p. 25). It left the manning, victualing and navigation of the vessel with the owners, and in all other respects was in a form that gave the charterers no property in the vessel (p. 25; p. 70).

When placed by her owners in the petitioner's custody for repairs, the vessel had been withdrawn from hire in accordance with the charterparty, and she so remained off hire until she had been redelivered by the petitioner to the owners and by them replaced in the service of the charterers (p. 66).

There was no privity of contract between the petitioner and the charterers (fol. 57), and the petitioner first learned of the charterparty after the accident (fol. 81).

The charterparty had been made in 1913, for a period of five years (p. 25). When the accident happened, in 1917, freight rates were more than fourteen times as high as they had been when the charter was made, so that the charterers lost a profit on a subcharter of their own, amounting to some $32,000 (fol. 150).

After an unsuccessful suit *in rem* against the vessel to recover for this loss (*The Bjornefjord*, 271 Fed 682, C. C. A., 2nd), the charterers brought the present suit in admiralty against the petitioner, alleging that the repair contract made by the shipowners with the petitioner was a contract for the charterers' benefit (Libel, p. 2).

Both the District Court (Southern District of New York) and the Circuit Court of Appeals for the Second Circuit, have held the petitioner responsible for the charterers' lost profits,

the District Court on the ground that the charterers had a property interest in the ship (fol. 108).

This ground of decision was rejected by the Circuit Court of Appeals, which held that the charterers had no property in the vessel (p. 70), and that there was no direct liability running from the petitioner to the charterers in contract (p. 68). At the same time the Circuit Court of Appeals held the petitioner liable to the charterers upon a theory of trust relationships, which may be summarized in three propositions:

First, that the shipowners, if they had seen fit to do so, might have recovered from the petitioner the full market value of the vessel's use, irrespective of the fact that they were committed by their charterparty to earning with their vessel less than the market rate of freight.

Second, that if the shipowners had recovered from the petitioner the full market value of the vessel's use, the shipowners would have held as trustees for the charterers the surplus recovered in excess of the shipowners' actual monetary loss.

Third, that in justice the petitioner should be held liable for the full market value of the vessel's use; that the petitioner

> "has no interest in and should not benefit because of the contractual obligations of the shipowner to the charterer or the absence of any liability of the owner to the charterer for the (petitioner's) negligence;"

and that—

> "It is unnecessary to determine in the instant case whether the charterer's right to recover for his loss is direct against the wrongdoer, enforcible by a libel independent of that which the shipowner but for the release could have brought for his damages, or whether it is indirect based upon the equitable obligation of the shipowner to the charterer, in analogy to the bailment and the *Winkfield* case (1902) Probate, 42; for no error is assigned because of the failure to join the shipowner as

libellant pursuant to the practice adopted in the *Sanostad* case, 266 Fed. 502. Even if the right be derivative and equitable in its nature, the settlement made and the release accepted, as it was in this case with full knowledge of libellants' claim, could afford no defense in admiralty, the more so when, as here, neither party intended it to operate as a release of more than the owner's own personal damages" (Opinion, p. 71).

## Reasons for Granting the Petition.

Your petitioner urges that the decision of the Circuit Court of Appeals should be reviewed by this court for the following reasons:

1. In view of the large number of vessels now operating under charterparties it is desirable that this court define the liability of repair companies and others that may contract with the owners of such vessels and later find themselves subjected to the claims of charterers for damages.

2. The decision of the Circuit Court of Appeals conflicts with the principle of the decisions of this court in *Savings Bank* v. *Ward*, 100 U. S. 195, and *German Alliance Ins. Co.* v. *Home Water Supply Co.*, 226 U. S. 220, and is opposed to the great weight of authority, in holding that if Peter negligently breaches his contract with Paul, Peter is liable as a tort feasor to a stranger whose own independent contract with Paul has thereby become less valuable.

3. The principle of the decisions of the highest English courts upon this important question of commercial law is contrary to the present decision.

*La Societe etc.* v. *Bennetts* (1911), 1 K. B. 243.
*Simpson* v. *Thomson* (1877), 3 A. C. 279.
*Pollock on Torts* (11th Ed.), p. 356.

4. The first premise of the present decision,—that the shipowners might have recovered from the petitioner the full

market value of the vessel's use, although their actual loss was less,—is opposed to the decision of the English Court of Appeal in the recent case of *The Susquehanna* (1925), 134 L. T. R. 45, and is not supported by any decision of this court.

5. If the petitioner's injury to the ship can be said to be a tort as to the charterers, there was no jurisdiction below, because the ship was injured while in a graving dock, and the alleged tort was not "committed and effective on navigable water" (Record, p. 69): *Gonsalves* v. *Morse Dry Dock & Repair Co.*, 266 U. S. 171 2.

6. If the petitioner's liability rests upon the grounds stated by the Circuit Court of Appeals, the cause of action is purely equitable and is not within the admiralty jurisdiction.

*The Eclipse*, 135 U. S. 599, 608.
*Minturn* v. *Maynard*, 17 How. 477.

WHEREFORE, your petitioner prays that this honorable court will be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals for the Second Circuit to bring up the case to this honorable court for such proceedings therein as may be just.

ROBINS DRY DOCK & REPAIR COMPANY
by
A. Calder Mayo
Its Proctor

STATE OF NEW YORK, County of Kings, } ss.:

A Holden Dyer, being duly sworn, deposes and says that he is Vice President of Robins Dry Dock & Repair Company, the petitioner herein; that he has read the foregoing petition and that the facts therein stated are true to the best of his knowledge, information and belief.

Sworn to before me this 30th day of July, 1926. } A Holden Dyer

WILLIAM H. WILSON, JR.,
Notary Public, Kings County 387
Commission expires March 30, 1927.

I hereby certify that I have examined the foregoing petition, and that, in my opinion, the same is well founded and is entitled to the favorable consideration of this Honorable Court.

JAMES K. SYMMERS,
Of counsel for petitioner.

## BRIEF IN SUPPORT OF PETITION.

Application is made under Section 240(*a*) of the Judicial Code for certiorari to review a final decree in admiralty rendered by the Circuit Court of Appeals for the Second Circuit on June 14, 1926, and shown at page 75 of the Record.

### POINT I.

**The basis upon which liability was imposed by the Circuit Court of Appeals is not cognizable by an admiralty court.**

The two suggested grounds of liability considered and rejected by the Circuit Court of Appeals, one, that the charterers were the intended beneficiaries of the repair contract; the other, that the charterers had a property right in the vessel, are so opposed to authority that they need not be discussed again here. (Opinion of C. C. A., Rec. pp. 68 and 70.)

It may be mentioned, however, that the libel alleged the existence of the first ground of liability, *i. e.*, that the charterers were entitled to recover from the petitioner upon some theory of liability analogous to the doctrine of *Lawrence v. Fox*, 20 N. Y. 268 (Record, p. 3); and that the District Court (following a District Court decision rendered by another judge in the case of *The Aquitania*, 270 Fed. 239) based the charterers' right to recover only on the second ground above mentioned, *i. e.*, that the charterers had a property interest in the vessel herself. (Opinion, D. C., Rec. p. 36.)

After weighing both these suggested grounds of liability the Circuit Court of Appeals expressly found both of them insufficient and itself predicated liability upon a novel theory.

This new basis of liability assumes that the petitioner

would have been liable to the shipowners for the full market value of the vessel's use during the period of her detention; that for the excess which they might have recovered beyond their own personal damages the shipowners would have been accountable as trustees to the charterers; and, finally, that in obtaining a release of the shipowners' claim without having paid the shipowners as consideration therefor the full market value of the vessel's use during the period of her detention, the petitioner in some way rendered itself liable to the charterers. (Opinion, C. C. A., Record, p. 72.)

The assumption of the Circuit Court of Appeals that the shipowners, if they had seen fit to do so, might have recovered from the petitioner the full market value of the vessel's use is not supported by any decision of this Court, and is contrary to a recent decision of the English Court of Appeal in the case of *The Susquehanna*, 134 L. T. R. 45, where it was held that the measure of a shipowner's recovery for the wrongful detention of his vessel is the value to the owner of the use to which he reasonably would have put the vessel.

But even assuming that the first proposition stated by the Circuit Court of Appeals be correct, and that the shipowners might have demanded and recovered from the petitioner an amount equal to the full market value of the vessel's use, it seems insufficient to say, as the Circuit Court of Appeals has said, that the charterers can recover simply because the shipowners failed to recover all they might have recovered from the petitioner. The release given by the shipowners to the petitioner was a release of all of the shipowners' claim (Record, p. 30), and it is immaterial that the consideration for the release was an amount equal only to the shipowners' personal loss, or that the release did not purport to discharge the petitioner from possible claims by the charterer. Nor was the petitioner concerned with the shipowners' alleged duty to share the collection with the charterers. Having fairly given the release, the shipowners could not themselves have asserted any further claim against the petitioner, no matter what the shipowners liability to

the charterers may have been for having failed to collect more. Hence, if the petitioner was liable in first instance only to the shipowners, as the opinion of the Circuit Court of Appeals would seem to concede, it is difficult to understand how the petitioner became liable to the charterers, in an admiralty suit, after the shipowners had released the petitioner.

If any liability were to exist at all upon these facts, the liability would be enforceable only in an equity suit, in which the petitioner would be apprised by the pleadings of the nature of the liability sought to be imposed.

> "So far as the creditors and intervenors were concerned, if the former desired to wind up the trust, or the latter to enforce an alleged contract of sale, which is indeed what is asked by this intervention, they should have resorted to a different tribunal. While the court of admiralty exercises its jurisdiction upon equitable principles, it has not the characteristic powers of a court of equity. It cannot entertain a bill or libel for specific performance, or to correct a mistake, *Andrews* v. *Essex Ins. Co.*, 3 Mason, 6, 16; or declare or enforce a trust or an equitable title, *Ward* v. *Thompson*, 22 How. 330; *The Amelia*, 6 Ben. 175; *Kellum* v. *Emerson*, 2 Curtis, 79; or exercise jurisdiction in matters of account merely, *Grant* v. *Poulton*, 20 How. 162; *Mautran* v. *Maynard*, 17 How. 477; *The Ocean Belle*, 6 Ben. 253; or decree the sale of a ship for an unpaid mortgage, or declare her to be the property of the mortgagees and direct possession of her to be given to them. *Bogart* v. *The John Jay*, 17 How. 399."
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> *The Eclipse*, 135 U. S. 599 at 608.

## POINT II.

**The holdings below are contrary to the applicable decisions of this court, and to the decisions of the highest English courts.**

The decision below holds that if a repairman receive a chattel from its owner and thereafter negligently injure the chattel, the repairman becomes liable to strangers who may have contracted with the owner respecting the chattel, even in the absence of any privity of contract between the stranger and the repairman.

The instances in which one becomes liable to a stranger for the consequences of his negligence in the performance of a contract were reviewed by this court in the case of *Savings Bank v. Ward*, 100 U. S. 195, and were also fully reviewed by the Court of Appeals of New York in the case of *MacPherson v. Buick Motor Company*, 217 N. Y. 382.

The facts of the present case bring it within none of the categories heretofore considered to be exceptions to the general rule that one who in the performance of his contract injures the subject matter thereof, is liable only to the other contracting party and to the owner of the injured chattel.

The rule is thus stated by Pollock:

> "When a binding promise is made, an obligation is created which remains in force until extinguished by the performance or discharge of the contract. Does the duty thus owed to the promisee constitute the object of a kind of real right which a stranger to the contract can infringe and thereby render himself answerable *ex delicto*? In other words, does a man's title to the performance of a contract contain an element analogous to ownership or possession. The general principles of law (notwithstanding forms of speech once in use and warranted by considerable authority) seem to call for a negative answer. It would confuse every accustomed boundary between real and personal rights, dominion and obligation, to hold that one who prevents Andrew from performing his contract with Peter becomes *ipso facto* a kind of trespasser against Peter."
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> (Pollock on Torts (11th Ed.), p. 356.)

The principle of the English cases analogous to the one at bar is illustrated in *Simpson* v. *Thomson*, (1877) L. R., 3 App. Cas. 279, and in *La Societe Anonyme de Remorquage a Helice* v. *Bennetts* (1911), 1 K. B. 243.

In *Simpson* v. *Thomson*, *supra*, Lord Penzance, in discussing and rejecting the principle involved in the argument there made in behalf of respondents, said:

> "The principle involved seems to me to be this—that where damage is done by a wrong doer to a chattel, not only the owner of that chattel, but all those who by contract with the owner have bound themselves to obligations which are rendered more onerous, or have secured to themselves advantages which are rendered less beneficial by the damage done to the chattel, have a right of action against the wrong doer, although they have no immediate or reversionary property in the chattel, and no possessory right by reason of any contract attaching to the chattel itself such as by lien or hypothecation." * * *
>
> "But if this be true as to injuries done to chattels, it would seem to be equally so as to injuries done to the person. An individual injured by a negligently driven carriage has an action against the owner of it. Would a doctor, it may be asked, who had contracted to attend him and provide medicines for a fixed sum by the year, also have a right of action in respect of the additional cost of attendance and medicine cast upon him by that accident? And yet it cannot be denied that the doctor had an interest in his patient's safety. In like manner, an actor or singer bound for a term to a manager of a theatre is disabled by the wrongful act of a third person to the serious loss of the manager; can the manager recover damages for that loss from the wrong doer? Such instances might be indefinitely multiplied giving rise to rights of action which in modern communities, where every complexity of mutual relation is daily created by contract, might be most numerous and novel."

In the *Societe Anonyme* case (*supra*) a steam tug belonging to the plaintiffs was engaged in a towage contract in towing a ship, when a steamship belonging to the defendant, by the negligence of the defendant's servants, came into collision

with and sank the tow. No injury was caused to the tug or her equipment by the collision. In an action brought by the plaintiffs to recover from the defendant as damages the amount of towage remuneration which they would have earned if they had completed the towage contract, it was held that the plaintiffs had no cause of action, for, although there was negligence on the part of the defendant's servants, the loss of towage remuneration was not damage to the plaintiffs which was the direct consequence of the negligence so as to be recoverable in law.

See also

*German Alliance Insurance Company* v. *Home Water Supply Company*, 226 U. S. 220.

*Byrd* v. *English*, 117 Ga., pp. 192 *et seq.*

*Cattle* v. *Stockton Water Works Co.*, 10 Q. B. 453.

The decision of the Circuit Court of Appeals does not give proper consideration to the fact that the charterers had an opportunity to protect their profits either by making themselves parties to the repair contract, or by stipulating with the shipowners that the ship, when off hire to permit repairs, should be restored to service within a specified time. If either of those things has been done by the charterers, it would not be necessary to go beyond accepted principles of law to give the charterers a recovery.

## POINT III.

**The ship was in a graving dock, outside admiralty jurisdiction, when she was injured.**

This suit was brought upon contract (libel, R. p. 3); but recovery was allowed in the District Court as for tort (opinion, Goddard, *D. J.*, Record, p. 39), and the opinion of the Circuit Court of Appeals seems to indicate that that Court also considered the petitioner's liability to be in tort, since the Court expressly found that there was no direct liability in contract (Opinion, C. C. A. at p. 68 and top of p. 69).

The courts below based their jurisdiction in tort upon the circumstance that the injury occurred while the vessel was in a graving dock, described by the District Judge as a "structure permanently resting on the shore, made by dredging and the building of a cofferdam; after the ship is floated into the dock, the gates are closed and the water pumped out" (Record, p. 34). The Circuit Court of Appeals dealt with the question of its jurisdiction in tort as follows:

> "As to a liability in tort, we are met at the threshold with an objection to the jurisdiction of a court of admiralty, based on the contention that the tort, if any, having been committed while the ship was in drydock, was not 'committed and effective on navigable waters' (*Gonsalves* v. *Morse Drydock & Repair Co.*, 266 U. S. 171, 172). We feel ourselves however, concluded as to this contention by *The Jefferson*, 215 U. S. 130, and *The Robert W. Parsons*, 191 U. S. 17." (Record, p. 69.)

It is submitted that in the case of *Great Lakes Dredge & Dock Company* v. *Kierejewski*, 261 U. S. 479, 480, and in *Gonsalves* v. *Morse Drydock & Repair Co.*, 266 U. S. 171, 172, this Court has made quite clear that at no time has this Court intended to authorize a departure from the old and familiar doctrine that in contract matters admiralty jurisdiction depends upon the nature of the transaction, and that in tort matters it depends upon the locality where the tort is

committed; that is to say, if the tort has been consummated on navigable waters, the Court has jurisdiction, otherwise not.

*The Jefferson, supra*, decided merely that a ship may none the less be the subject of a salvage service when she is on dry-dock and in danger of being destroyed by fire originating on land. It is evident that the Court considered salvage as growing out of, or analogous to, implied contract; and therefore considered that it was immaterial that the vessel was on land at the time; the jurisdiction of the Court in matters of contract and salvage being not dependent upon locality, but merely upon the maritime character of the transaction.

*The Robert W. Parsons, supra*, decided only that an admiralty court has jurisdiction of a contract for the repair of a vessel, no matter where the ship may lie when the repairs are made. It is submitted that the language used by this Court in that case is not applicable to a case of tort, and that the later cases of this Court above referred to indicate that this Court has at no time held that a tort committed upon a vessel while resting in an innavigable drydock is within the admiralty jurisdiction.

## Conclusion.

It is respectfully submitted that the writ of certiorari should be granted as prayed for.

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